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Government
Publication

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE
ORGANIZATION

WEDNESDAY, APRIL 27, 1983



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Eves, E. L. (Parry Sound PC)

VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)

Brandt, A. S. (Sarnia PC)

Breithaupt, J. R. (Kitchener L)

Elston, M. J. (Huron-Bruce L)

Fish, S. A. (St. George PC)

Gillies, P. A. (Brantford PC)

Kolyn, A. (Lakeshore PC)

Renwick, J. A. (Riverdale NDP)

Spensieri, M. A. (Yorkview L)

Stevenson, K. R. (Durham-York PC)

Swart, M. L. (Welland-Thorold NDP)

Substitutions:

MacQuarrie, R. W. (Carleton East PC) for Mr. Mitchell

Watson, A. N. (Chatham-Kent PC) for Mr. Stevenson

Clerk: Arnott, D.

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, April 27, 1983

The committee met at 10:08 a.m. in room 151.

ORGANIZATION

Clerk of the Committee: Honourable members, it is my duty to tell you that you must select a new chairman.

Mr. Renwick: I nominate Mr. Eves as chairman.

Mr. MacQuarrie: I second it.

Clerk of the Committee: Are there any further nominations? There being no further nominations, I declare nominations closed and Mr. Eves selected chairman of the committee.

Mr. Chairman: I guess the next order of business, of course--

Mr. Kolyn: You won by six.

Mr. Chairman: I wish to thank my colleagues for the trust they have placed in me.

Mr. Breithaupt: Don't go too far.

Mr. Chairman: I am not going to do that. I am sure we will have no problems at all, Mr. Breithaupt.

The next duty, I suppose, is the election of a vice-chairman. Do we have any nominations for vice-chairman?

Mr. Kolyn: I nominate Bob Mitchell.

Mr. Chairman: Is there a seconder for that motion?

Mr. MacQuarrie: I second it.

Mr. Chairman: Any other nominations? If not, those in favour of the motion?

Motion agreed to.

Mr. Chairman: To the best of my knowledge, there is nothing referred to the committee; is there, Mr. Clerk?

Mr. Renwick: There is just nothing at all, nothing tagged in from the last session at all?

Mr. Chairman: I believe there were a few small private bills, if I recall, that were given to the standing committee on regulations and other statutory instruments at the end of last session. I understand from talking to the House leader's office

that we may have estimates as early as next week some time. If there is no further business anybody wishes to discuss--

Mr. Renwick: There was the one private bill at the end of the session on that mine.

Mr. Chairman: Bargnesi Mines?

Mr. Renwick: Where is it referred to?

Mr. Chairman: I believe it is referred to regulations.

Mr. Renwick: I have forgotten the name of it.

Mr. Chairman: It is not on the order paper. I will check into that or have the clerk check into it.

Mr. Renwick: Perhaps, Doug, you would let me know where it is, would you? I would like to go to that committee the day it comes up.

Mr. Chairman: That was rather interesting, wasn't it?

Mr. Renwick: Yes.

Mr. Chairman: Okay, if there is no further business, I would suggest that we adjourn at the call of the chair.

The committee adjourned at 10:11 a.m.



Lacking J-2-6, 1983.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE
MOTION RE ANNUAL REPORT
WEDNESDAY, JUNE 15, 1983



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Eves, E. L. (Parry Sound PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
Brandt, A. S. (Sarnia PC)
Breithaupt, J. R. (Kitchener L)
Elston, M. J. (Huron-Bruce L)
Fish, S. A. (St. George PC)
Gillies, P. A. (Brantford PC)
Kolyn, A. (Lakeshore PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)

Substitutions:

Foulds, J. F. (Port Arthur NDP) for Mr. Swart
Mancini, R. (Essex South L) for Mr. Elston
Villeneuve, O. F. (Stormont, Dundas and Glengarry PC) for Mr Swart

Also taking part:

McMurtry, Hon. R. R., Attorney General

Clerk: Arnott, D.

Witnesses:

From the Ministry of the Attorney General:

Campbell, A., Deputy Attorney General
Carter, G. H., General Manager, Program Administration Division
Chaloner, R., Director of Crown Attorneys
Ewart, J. D., Director, Policy Development Division

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, June 15, 1983

The committee met at 10:05 a.m. in room 151.

MOTION RE ANNUAL REPORT

Mr. Chairman: I see that we now have a quorum present this morning. I would ask committee members to take their places before the Attorney General (Mr. McMurtry) arrives. Perhaps we can deal with a motion from the member for Kitchener (Mr. Breithaupt) of which he has given notice.

Mr. Breithaupt: Mr. Chairman, I have a motion to place before the committee with respect to its schedule.

Mr. Chairman: Mr. Breithaupt moves that pursuant to the petition tabled in the Legislature on Monday, May 30, 1983, requesting the referral to the standing committee on administration of justice of the annual report of the registrar of loan and trust corporations of the Ministry of Consumer and Commercial Relations for the year ended December 31, 1981, the same annual report be considered by this committee during the Legislature's summer recess for such period of time as the committee determines is necessary so that this committee may conduct an inquiry into the capacity of the Ministry of Consumer and Commercial Relations to meet its responsibilities and duties in regulating loan and trust corporations licensed to carry on business in the province of Ontario.

Mr. Breithaupt: Mr. Chairman, last Wednesday morning the Leader of the Opposition (Mr. Peterson) appeared before this committee to seek a change in schedule to deal with a variety of concerns that have arisen with respect to the administration of the trust companies affair. I will not repeat those particular points; they are available for anyone to see and consider.

Since the estimates of the Ministry of the Attorney General will be before us and it is not likely that they will be completed before this session ends in the next 10 days or so, we will otherwise lose an opportunity to proceed with this reference if it is to wait at least until after the completion of these estimates.

There is no doubt in my mind that the event we have before us is perhaps the biggest regulated-company calamity to hit Ontario and, indeed, Canada in more than a decade. We all know the previous examples of Astra Trust, Re-Mor, Argosy, Co-operative Health, IOS, Atlantic Acceptance, British Mortgage and all these other things; but this is a particular problem that I think is worthy of a review by this committee.

Given the responsibilities we have as legislators, surely there are very few matters in the consumer affairs field that require much more immediate attention of the Legislature than the

regulation of the trust company industry. At the present time there is prima facie evidence to suggest neglect on the part of the ministry in regulating these companies, particularly Greymac Trust and Seaway Trust.

We have been shown instances of the same sort of over-mortgaging going back during the past two years before the major Cadillac Fairview apartment flip. More recently, my leader has brought up examples of what appears to be over-mortgaging on the part of Dominion Trust and Continental Trust which suggests we may have a pattern of over-mortgaging that is much more widespread than earlier believed.

Surely, then, no one would deny the need for a thorough review of this whole area. The standing committee on administration of justice, as a tripartite, open, public body, is the best forum short of a public inquiry to conduct such a review. I recognize there will be those who will argue that we should await the results of the minister's internal review, the Morrison report or the minister's white paper. But I would make the three following points.

First, these items are not to be the be-all and end-all in terms of a review of this issue. The committee can begin a public review without them.

Second, by having this committee in place, the various reports can naturally be sent to this committee where they could be publicly reviewed and debated.

Third, as these reports are due soon, it is important for the committee to be seized of the matter as early as possible so a review of these issues can be conducted during the summer and not await the fall session.

Last week, certain committee members made the argument that the Justice policy secretariat estimates were due that day and we should not proceed to interrupt that business, and the committee decided that would be the result. But surely by sitting at some appropriate time during the summer to be arranged by the House leaders, we could avoid all the other commitments of this committee so as to address the serious issues surrounding the regulation of trust companies in Ontario.

As I have suggested, the estimates of the Ministry of the Attorney General, which are before us today and which will take some 13 hours of committee time, are not likely to be completed unless we sit into the last week of June. The understanding now is that this session may adjourn some time about June 24. As a result, there will be at least several hours of these estimates left, perhaps dealing with one or two of the latter votes, to which we will be returning when the Legislature resumes in October. We then have other items to complete.

It is my suggestion that the committee would be well served to commit itself to a week or two this summer, to obtain permission to do that and to allow in a calm and somewhat unhurried way the same review of difficulties in the trust company

scene as was attended to in 1981 when the Astra/Re-Mor situation was upon us. I recognize the minority government at that time perhaps gave an opportunity to bring forward a committee that could deal with many of these subjects more readily.

But surely we are all interested in attempting to review as quickly and as clearly as we can what responsibilities there have been in the ministry itself to do certain things or to deal with a variety of financial reports and concerns in an appropriate way in accordance with the Manual of Administration within the ministry.

These are the things I suggest the committee could look at, and I think we should do this before we allow another two, three or four months to go by. Once we return in mid-October, which would be the expected time, we will be continuing with other work before this committee. The estimates before us following the Ministry of the Attorney General will probably take much of the time the committee has available to it until well into November.

Rather than have that time lost and have further turmoil and involvement, not only in the Legislature but otherwise, I would hope the committee would entertain seriously the suggestion I make with respect to using part of the summer recess. There have been few decisions made so far as to committees meeting during the summer recess. I believe there will be a number in September that are going to become involved. But we would have the opportunity to meet for a week or two perhaps in the latter part of July to deal with this particular theme. I suggest it would be a sound way of proceeding, and I would hope the committee members would consider it.

As a result of approving this motion, they would then allow the chairman to make the necessary arrangements for the kinds of hearings that I think would be useful.

Mr. Mitchell: Mr. Chairman, I certainly do not wish in any way to put down the comments of the member for Kitchener and his particular motion. Members may recall, and I want to make this clear, that at least from my point of view none of us here has said this report should not be considered. However, at the time the motion to refer the 1980 report was tabled, we clearly pointed out that there were a number of things ongoing which some of us had a fear a motion such as this could have an adverse effect upon. I know this statement has been made many times around this table, and most certainly I am not a lawyer, but I have read in the papers, as many of us have, where certain court cases have been jeopardized because of public discussion in a public forum.

Mr. Renwick: Such as?

Mr. Mitchell: I cannot remember specifics, Mr. Renwick, but I have seen--

Mr. Renwick: I did not think you could.

Mr. Mitchell: I have seen them in the paper.

Interjections.

Mr. Mitchell: Unlike yourself, Mr. Renwick, I am not learned in the law and I do not keep a dossier on all the cases.

Mr. Renwick: You do not have to put me down.

Mr. Mitchell: I made no attempt to put you down.

Mr. Renwick: You do not have to tell me that you are not learned in the law and--

Mr. Mitchell: I apologize for that if that is the feeling that was assumed. I did not mean it--

Hon. Mr. McMurtry: I always thought you were pretty learned in the law.

Mr. Chairman: Please proceed. Try to ignore the interjections, please.

Mr. Mitchell: In any event, Mr. Breithaupt did refer to the fact that the Morrison inquiry was ongoing. He is also aware that there are court cases and the possibility of additional court cases. He is quite correct in pointing out that there are internal reviews and processes. The minister has indicated he hopes to table a white paper in the very near future. He has also indicated to the House that the outcome may well result in, and in fact he is considering the possibility of, an external review.

Again I say to the member for Riverdale, it is not meant to put anyone down. It is just a feeling I have, and I think it is shared by many of us. To consider this at this particular time or during the summer, until such time as all the various actions are completed, would be premature and in my humble opinion perhaps would jeopardize the ongoing investigations and possible actions.

Mr. Stevenson: Mr. Chairman, I would also like to speak against the motion. Looking at these annual reports at this time, as has already been stated, the Morrison commission is taking a relatively thorough look into a fairly wide portion of this particular problem or the cases that are in front of us.

Also, there is the internal review that is going on in the ministry. As I recall, I believe the minister has stated that if that does not appear to be sufficient, there will be an external review of the past and proposed procedures for the ministry's duties; how those have been performed and how they should be performed.

It is fairly clear from the response of loan and trust companies in general, which are continuing to function in a fairly successful way, that they have not disapproved of the government's action in the handling of the Greymac, Seaway or Crown situations. It seems to me that the industry must realize that there were certain abuses going on there, that those sorts of things are not in the best interest of their companies or of the industry and that these sorts of things will not continue to happen in the future. Just from the response over the past few months this seems to be a pretty clear reaction to me. Certainly there has not been

any particular outcry from the other loan and trust companies on the actions that were taken or the reasons for the actions.

10:20 a.m.

With regard to the most recent case that has been mentioned, Dominion Trust, if there are breaches of the Loan and Trust Corporations Act there, I am sure the ministry investigators will check them out. Certainly it is not something you step in on quickly, because you have to investigate whether these are occurring, and you certainly cannot investigate them by shutting a company down. I have reasonable confidence that the ministry people will handle this in the way it should be handled.

If we look back over the past few months, I think we can see that the minister and the ministry have moved with dispatch in handling these problems as they have arisen and that they have done it in such a way as to maintain the confidence of the public and of the loan and trust companies in the industry as well as the public's confidence in that industry.

It seems to me with the current investigations that are going on that having this committee look into many of the same things at the same time is very premature and that we should wait to get the benefit of these other reports before we start into this procedure.

Mr. Mancini: Mr. Chairman, I am here to support my colleague's motion. All of us will recall last week, when a similar motion was put before the committee, that the primary objection from the government members at that time was that it would disrupt the current schedule for the estimates of the Ministry of the Attorney General.

While I believe the government members could possibly have made a case and did make a case for that particular objection, I cannot now see why we cannot set a schedule that would allow this committee to sit in the summer, when no time would be taken away from the debates that have been scheduled for the Ministry of the Attorney General.

If one believes the government members last week that this was their primary concern, then we have taken steps to alleviate that concern. Now, of course, once this has been done, we hear a new objection from the government members: that we must wait for the minister and his other investigators as to what did take place during this tremendous scandal, which has cast a dark cloud over the whole trust industry of our province.

Whether the government members know it or not, people all over Ontario are deeply worried about the state of the trust industry in this province, and they have good reason to be concerned. Anyone who has followed these matters even in a cursory way knows that we have had several failures, and the most recent failures certainly have shaken the industry right down to its toes.

I cannot see why an all-party committee of the Legislature would be reluctant to take an opportunity to review the situation

to find out exactly where the failings of the ministry are. Are the failings with the investigators? Are the failings with the laws we have in place? Is the problem possibly that the minister is not well enough informed? There are several important questions that have to be answered here. The people who will benefit from the answers to these questions are the general public, and we are here to defend the general public.

I firmly believe my colleague's motion is fair and gives people an opportunity to prepare themselves as to what information should be put before the committee. It in no way interferes with any other investigation that is going on. I believe it would serve all of us well to find out exactly how these mammoth failures could occur right under the noses of our regulators.

We have seen information that explains to us what the regulators have to do when they are reviewing the ongoing operations of these companies. One would have to believe that if all the steps were taken that should have been taken, possibly some of the things that have happened would not have happened.

We sit here casually after these failures have occurred. We sit here casually after the government has moved in and expropriated three large companies. We sit here casually after the Canada Deposit Insurance Corp. has probably had to guarantee hundreds of millions of dollars. We sit here casually and say, "We are going to wait for some internal government reports."

The fact of the matter is that the internal operations of the government have failed us, and that is why we are requesting that the members of the Legislature look into these matters.

If we abdicate those responsibilities to look at the failures of the internal operations of the government we might as well pack it up and turn everything over to the regulators. If they feel like doing their jobs properly one week, fine; if they do not feel like doing their jobs properly the next week, fine, let us just jeopardize the whole industry.

What we want here, as a committee, and I support my colleague entirely, is to strengthen the review process the regulators must undertake to ensure a strong and reliable trust industry so that the deposits of the general public can be protected.

All we are asking for is an opportunity, at a predetermined date, to do this in an orderly fashion so that we can review some of the things that have happened. This cannot be done in question period. This cannot be done by writing letters back and forth to the minister. This cannot be done in any way other than in the forum of this committee.

My colleague has stated that he is prepared to sit down and ask the House leaders to negotiate a schedule that would accommodate all three parties; a schedule that would put no other committee's work in jeopardy, I assume; and a schedule that would leave intact the present work of this committee. We have answered today all the concerns that were put forward last week by the government members.

If the government members today find new objections to what we want to do, I have to say to them, with all respect, that what they did last week was just a stall for time, what they are doing this week is just telling the committee they are not interested in reviewing the situation as it has happened, and all they want to do is sweep the whole thing under the rug and hope the summer goes by, we get back in October and our schedules are full, and we do not have an opportunity to look at this very important matter.

If they do not want to look in review at the situation, they should just come out and say so. Let them not beat around the bush and say, "We have this problem or that problem." If they do not want to review the failures that have occurred, they should just say so and we will know exactly where we stand.

10:30 a.m.

Mr. Gillies: Mr. Chairman, I certainly do not wish to repeat any of the arguments made by members thus far. I would like to point out, with the greatest of respect to my friend from Essex South (Mr. Mancini), that the concern about the scheduling of committee business was certainly not the sole concern of members of this party when this matter was last considered a week ago.

There is, I think, a more important concern which has already been mentioned by my friend the member for Durham-York (Mr. K. R. Stevenson). He pointed out that there is a comprehensive inquiry into this matter going on under the chairmanship of Mr. Morrison. That inquiry, we feel, deserves the time to conduct its business and to turn up what it feels are any possible deficiencies or areas that require action.

I am sure it is readily evident to all members, whether learned in the law or not, that such an inquiry could indeed lead to matters that will find themselves in the court system in the not-too-distant future. Scheduling is certainly not the primary concern; rather, the concern is that these inquiries and whatever other internal measures are being taken by the ministry and the government to examine the problems in this area be allowed to conduct themselves and come to a logical conclusion without, at this time if you will, competing with another inquiry in the legislative arena.

I concur with my colleagues who have already spoken that this is not the time to be examining this issue. At the same time, I want to remind my friends opposite that the referral of the report does remain on the order paper, and it remains as an item of business that can be considered by this committee. And at the time it is deemed appropriate, I would expect we would again be prepared to look at that.

Mr. Mancini: What is that time? What is the appropriate time? I want to ask the member for Brantford (Mr. Gillies), when is the appropriate time?

Mr. Chairman: Mr. Mancini, Mr. Gillies has the floor.

Mr. Mancini: We never seem to be able to find the appropriate time, Mr. Chairman.

Mr. Chairman: Mr. Mancini, we are not in a debate. Mr. Gillies has the floor. He remained quiet while you addressed your remarks. We have several other speakers on the roll.

Mr. Gillies: Mr. Chairman, I certainly do not intend to get into a debate. If the member had been listening, not a minute ago I pointed out to him that one of our great concerns on this side was not so much the timing of committee work, although he quite rightly pointed out there was one point we raised.

I think the greater concern raised by members last week, and which is being raised again this week, is the ongoing internal ministry inquiries and our desire to let those inquiries go about their business and bring something forward that members of this Legislature can consider. At that time, I think we can make a more informed and reasonable decision as to whether or not a committee inquiry is required.

That, I would say to my friend, is what we would consider the appropriate time.

Mr. Renwick: Mr. Chairman, I do not wish to go over any of the ground that has been covered. I appreciate the comment of the member for Brantford because that did clarify what was of concern to me in the submission made by the member for Durham-York, which was significantly different from the submission made by the member for Carleton (Mr. Mitchell) on this question.

The member for Carleton indicated, as I understand it, that there would be a point in time, however distant, when this matter might be considered by this committee. But the member for Durham-York (Mr. Stevenson) and the member for Brantford have confirmed that it is not the intention of the government members to ever permit the matter to be discussed in the committee.

The second matter to which I want to draw attention is that I do not know, and I would certainly appreciate any member of the assembly or anyone else drawing to my attention, any occasion when the deliberations of a committee of this assembly have jeopardized any matters before the courts.

Mr. Mitchell: Not this committee.

Mr. Renwick: No. Any committee of this assembly engaged in its deliberations has not--so far as I am aware, although there may be instances--jeopardized any proceedings in the courts.

Third, we must remember that, while it was true there was a minority government, the decision was the unanimous decision of the House to have this committee look into the matters related to Re-Mor, and undoubtedly the proceedings of this committee had a significant bearing on the ultimate recommendation by the Ombudsman with respect to reparations for those who had suffered financial loss as a result of the failures of the regulatory instruments of the government.

My last point is simply that we are not asking to have an inquiry into Greymac, Seaway and Crown Trust; those are in very

capable hands. What we are interested in is, what have been the practices and procedures of the registrar of loan and trust corporations and others charged with the regulatory responsibility of government that have permitted the debacle which has taken place to take place not only in those three trust companies but in a number of other trust companies?

There was a trust company that predated the problems of those three trust company problems which have had such a high profile recently. There are the problems at District Trust Co. in London, where an investor in the shares of District Trust Co. has practically a worthless investment at this time. It had to be taken over under a management agreement.

Reference has been made to Dominion Trust. It is not limited to one trust company; it is with respect to the statutory responsibility of the registrar of loan and trust corporations to regulate that industry in accordance with the law. I think it is quite appropriate that this committee would deal well and circumspectly with that problem.

I sense, certainly from the indications that have been made, that as long as any of these matters are before the court or as long as these investigations are continuing, the government members will prohibit this committee from ever entertaining a consideration of the role of the registrar of loan and trust corporations.

As everyone will know, there will be a new parliament before all those matters are disposed of. In fact, it is very much like getting the Campbell Grant report which the Premier (Mr. Davis) indicated he was going to table at the earliest possible moment when the court proceedings were completed. I am not quite certain of the number of years, but I think it was five or six years ago when that commitment was given. The court proceedings are not yet completed.

I would urge the government members to reconsider the reasonable proposal put forward by the member for Kitchener (Mr. Breithaupt) which my colleague and I will, of course, support when it is time to vote on it.

I apologize to Mr. Mitchell for being somewhat touchy on that general question and I would also, as I stated in the House one day, like to have the term that, "The member for Riverdale is a lawyer," declared an unparliamentary term, as well as "constructive," "responsible" and "thoughtful." Those were the four words I wanted to have declared unparliamentary.

Mr. Breithaupt: But not trenchant?

Mr. Renwick: No, that is quite all right.

Mr. Foulds: Mr. Chairman, I have two or three brief things I would like to say. I do not see any reason--and I have yet to see a good reason put forward--why this committee should not examine the question put forward in Mr. Breithaupt's motion.

Surely, if parliament and committees are to have any sense of worth, any sense of *raison d'être*, it is to examine the role of government agencies, government ministries and how they are functioning, whether they are functioning well and effectively.

10:40 a.m.

Last night, after I learned of the Blue Jays result, I noticed in the business section of the Globe and Mail that Quebec has done away entirely with its Ministry of Consumers, Co-operatives and Financial Institutions and set up an inspector-general of financial institutions to regulate things like trust companies.

It may well be that this committee, in looking at the particulars of Mr. Breithaupt's motion, would find that the ministry structure by very definition cannot effectively regulate the matters it should have been regulating. It may want to examine the steps that are taken in other jurisdictions, in Quebec, in other provinces and at the federal level, to see if there are recommendations that we as a committee, a parliament, a legislature can make that would toughen the regulatory powers and ensure that what happened in this particular debacle, as my colleague the member for Riverdale called it, does not happen again.

I would simply urge the Conservative government members to consider very seriously the implications of their vote against Mr. Breithaupt's motion. If they continue to vote against it, they are voting for a diminishing of parliament, they are voting for a diminishing of the Legislature, they are voting for a diminishing of responsibility of the committee system. I suggest to you that if parliamentarians are to have any sense of worth or any real value, it is as a watchdog of government and a watchdog of government agencies.

In this case, it is clear that one of the government agencies did not act as effectively as it could have and it is our job to find out why and to make recommendations about how to remedy that. I would urge the government members to reconsider and to vote for Mr. Breithaupt's responsible, reasonable and common-sense motion.

Mr. Chairman: We will call the question of Mr. Breithaupt's motion. I trust you are all aware of what it is; you have been supplied with a copy. Those in favour of the motion?

Mr. Renwick: Could I request that the vote be recorded?

The committee divided on Mr. Breithaupt's motion, which was negated on the following vote:

Ayes

Breithaupt, Foulds, Mancini, Renwick.

Nays

Fish, Gillies, Kolyn, Mitchell, Stevenson, Villeneuve.

Ayes 4; nays 6.

Mr. Mancini: You are using your majority to hide your own incompetence. That is the only reason you are voting "no." You do not care about (inaudible). You do not care about the external report. All you want to do is protect the government's incompetence. That is what the "no" votes were for, just to protect the government's incompetence. You do not care about the industry or the general public; you just want to cover the minister's behind.

Mr. Chairman: The motion has been dealt with.

Mr. Mancini: We just get a little bit tired of not being able to carry out our responsibilities because the government members want to protect their own government, that is all.

Mr. Chairman: Would committee members please try to restrain themselves somewhat.

Mr. Gillies: That, Mr. Chairman, was the sole reason the motion was brought in in the first place.

Mr. Mancini: It was not the sole reason.

Mr. Chairman: Are we quite finished?

Mr. Foulds: On a point of order, Mr. Chairman: ??I feel that Mr. Gillies's remark should be withdrawn because it imputes motives and is contrary to the rules of the House.

Mr. Gillies: I will withdraw--

Mr. Mitchell: So were the remarks made by the member for Essex South. We have clearly stated, and in fact if the chair had given permission for us to do so last week, we would have clearly stated the same reasons we have stated this morning.

Mr. Chairman: Mr. Mitchell, Mr. Foulds has the floor on a point of order. Mr. Gillies, did I hear you say that you withdraw?

Mr. Mancini: You said your concern was the schedule. Forget those concerns. Your concern is not the schedule.

Mr. Chairman: Are you quite finished with your speech, Mr. Mancini? Mr. Foulds had the floor on a point of order. He requested that the member for Brantford withdraw his remark. I believe Mr. Gillies responded.

Mr. Gillies: Mr. Chairman, I am quite prepared to withdraw my remark at the same time the member for Essex South withdraws his, which clearly imputed motives.

Mr. Mancini: I have not heard the chairman say anything about my remarks.

Mr. Chairman: Thank you. The motion having been dealt with, we have spent a considerable amount of time on it this morning and I suggest we should now proceed with the estimates of the Ministry of the Attorney General.

The committee moved to other business at 10:46 a.m.

Lacking J-8-15, 1985.

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J-16

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

EMPLOYMENT STANDARDS AMENDMENT ACT

WEDNESDAY, NOVEMBER 2, 1983

Uncorrected draft copy



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Kolyn, A. (Lakeshore PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
Breithaupt, J. R. (Kitchener L)
Elston, M. J. (Huron-Bruce L)
Eves, E. L. (Parry Sound PC)
Gillies, P. A. (Brantford PC)
MacQuarrie, R. W. (Carleton East PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)
Taylor, J. A. (Prince Edward-Lennox PC)

Also taking part:

Gillies, P. A., Parliamentary Assistant to the Minister of Labour
(Brantford PC)
Johnston, R. F. (Scarborough West NDP)
Mackenzie, R. W. (Hamilton East NDP)
Ruston, R. F. (Essex North L)

Clerk: Arnott, D.

From the Ministry of the Attorney General:
Revell, D. L., Legislative Counsel

Witnesses:

Berman, C., President, Bermark Jewellery Ltd.
Silverberg, Dr. B., Applied Polygraph Sciences Inc.

From the Ontario Association of Polygraph and Audiostress Analysts:
Fallis, P., Counsel
McQuiston, Colonel C. R.

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE ADMINISTRATION OF JUSTICE

Wednesday, November 2, 1983

The committee met at 10:02 a.m. in room 151.

EMPLOYMENT STANDARDS AMENDMENT ACT

Consideration of Bill 68, An Act to amend the Employment Standards Act.

Mr. Chairman: We are meeting today to consider Bill 68, An Act to amend the Employment Standards Act, which was referred to the standing committee on the administration of justice following second reading on Tuesday, October 25, 1983.

Before we proceed with brief opening remarks by the parliamentary assistant of the Ministry of Labour, Mr. Phil Gillies, I would like to draw two matters to the attention of the committee.

First, the committee has requested that the Solicitor General (Mr. G. W. Taylor) or his representative appear to discuss the use of polygraphs in police investigations. Accordingly, Mr. John Ritchie, director of the legal branch of the Ministry of the Solicitor General is scheduled at 5 p.m. tomorrow afternoon.

Also, the committee originally set aside only two days to consider Bill 68. However, we already have a very full schedule of public presentations on these two days and three requests in addition that we could not accommodate, namely the Canadian Association of Police Polygraphists, the Ontario Association of Chiefs of Police and the director of security of Radio Shack Canada.

Therefore, I would ask the committee if they would agree to meet next Wednesday, November 9, to conclude the hearings of public presentations and commence with clause-by-clause consideration of the bill.

Mr. Renwick: That would be agreeable with me, Mr. Chairman.

Mr. Spensieri: Alright.

Mr. Mitchell: I do not have any difficulty with next Wednesday. However, looking at the time allocation that has been given for the schedule we have now and appreciating your suggestion that there are three other groups who wish to be heard, I would question whether our normal sitting time on a Wednesday would be sufficient.

Mr. Chairman: I should think that we could conclude with the groups and finish off on Wednesday. As you are well aware, a

Mr. Chairman

Friday was out of the question because some of the members have indicated that Friday has been taken up with other duties.

Mr. Mitchell: This Friday?

Mr. Chairman: Yes.

Mr. Mitchell: I do not question that next week we are on reduced sittings because of most of us returning to our ridings for Armistice Day.

If time becomes a problem on Wednesday, and wanting to ensure that it does ~~not~~

J-1005 follows

(Mr. Mitchell)

~~most of us returning to our ridings for Armistice Day.~~

~~If time becomes a problem on Wednesday, and wanting to ensure that it is in fact get finished on Wednesday, is there any leeway for us to perhaps guarantee that the comments to be made by those wishing to attend will be completed and if necessary, that we deal with clause by clause that afternoon, since we are expected to be here in any event?~~

Mr. Chairman: Hopefully, if we can more or less maintain the schedule we have set out, I think we can accomplish everything we want to. But I think Thursday will give us a better indication of where we are and how we are going. If we do not conclude on Wednesday, that means we have to turn it over an extra week because we would not be sitting on the following Thursday.

Mr. Mitchell: Again, I just look at the schedule. This morning, you are allowing 40 minutes between the groups speaking this morning and 45 minutes for the groups this afternoon, and you are talking about three groups.

Mr. Renwick: Why do we not just get on with it.

Mr. Chairman: Alright. I think we should proceed. Let us just see how we work out on Thursday and we will have a better indication.

Mr. Mitchell: Okay.

Mr. Chairman: The first witness is Mr. Charles Berman from Bermark Jewellery Ltd.

Mr. Berman: I have copies of my statement if you wish to pass them around.

Mr. Chairman: Thank you. The clerk will do that. Just before you start, the parliamentary assistant has a few comments which he would like to make.

Mr. Gillies: I am sure most or all members of the committee are aware of the major features of Bill 68. I will briefly review them.

The bill proposes to remove the right of people in the employment context to administer a lie detector test to employees or prospective employees. The ministry has considered this move very carefully and over a period of some five or six years, before introducing this particular legislation, members may recall this was a key recommendation in Mr. Justice Morand's review of police procedures in Metropolitan Toronto. It has also been an ongoing concern of the Attorney General (Mr. McMurtry) for a period of years. To accomplish this requires amendments to the Employment Standards Act and that is what we are undertaking here.

I believe we have two primary areas of concern in acting in this regard. The first one we could broadly call the moral or ethical question which I will address briefly. The other concern that both the Attorney General and the Minister of Labour (Mr. Ramsay) have pertains to the scientific aspects, the accuracy of this testing.

To briefly highlight, the bill would have the following major features: It would give the employee a right not to take or to be asked or required to take or submit to a lie detector test.

Second, no person shall require, request, enable or influence, directly or indirectly, an employee to submit or take such a test.

The bill also provides for sanctions in this regard. Where an employer contravenes the provisions we envision under Bill 68, there would be sanctions by way of reinstatement of hiring or other sanctions up to a \$4,000 reimbursement to the employee who may have been aggrieved in this regard.

Third, the bill provides for a specific exemption from the thrust of Bill 68 for police departments and law enforcement officers in the province who would continue to have the right to use the lie detector test as a part of their ongoing investigative procedures. There are a number of reasons why we propose to do this and I am sure as the bill unfolds and our discussions continue, these will become evident.

That would constitute all of my opening remarks.

Mr. Renwick: I might give the committee notice that during the clause-by-clause debate on the bill, I intend to move the deletion of item..

J-1010 follows

Mr. Renwick: I might give the committee notice that during the committee clause debate on the bill, I intend to raise the deletion of item 39(d), the provision with respect to the reservation of the right of the police.

Mr. Berman: I am representing not only myself but the Canadian Jewellers' Association of which I am a director. So I am representing both in this behalf.

As president of a large Canadian jewellery manufacturing firm employing over 90 staff and representing the Canadian Jewellers' Association, an association representing 1,600 members of the Canadian jewellery industry, I am concerned with the polygraph issue.

The jewellery industry is particularly vulnerable to internal theft because of the volume of precious materials handled by our employees. The jewellery industry is one which spends much time and effort in developing internal organizational systems of security. These can consist of tracking inventory by weight and count from one production area to another and to individual surveillance techniques such as closed-circuit cameras.

The polygraph test is one of the security tools in determining employee reliability. We are not aware of any other tools that can be used to any greater degree of reliability at a similar cost factor which can measure the honesty of potential employees. Let me stress that the polygraph test is used as only one important component of an overall security system. I would submit to the members of the standing committee that the jewellery industry should be allowed to use the polygraph test as part of its necessary security systems.

Mr. Chairman: Does that conclude your preliminary remarks, Mr. Berman?

Mr. Berman: I suppose so. I know that most of the major manufacturers have suffered losses at one time or another through their employees. I for one have resisted some of the techniques going on such as physical searching of employees coming out of the work place and so on. I tend to think that in screening in particular, using a polygraph helps us avoid hiring someone who we would let go a little later on anyway. So I view it as a screening thing in particular.

That is all I have to say, I suppose. I welcome any questions.

Mr. Renwick: Mr. Berman, would you be good enough to give us two or three examples of the use to which your company has put the polygraph test, the circumstances in which you have used it and some...

J-1015 follows

(Mr. Renwick)

~~Would you be good enough to give us two or three examples of the use to which your company has put the polygraph test and the circumstances in which you have used it and some sense of the number of occasions over a period of time.~~

Mr. Berman: The way we use it is when we screen our employees in our bulk area only. We ask if they would mind not taking the test. The ones we have narrowed it down to, we would ask them to take it and it helps us verify that they have made out their application correctly. I suppose as the values that they would handle are quite high, it would protect us say against a drug addict or something like that, where the incentive to steal would be high in order to ?? and so on.

It is one of the things we consider when we are hiring someone. That is the only use I put it to. If there was an internal theft, I would talk to the police department and let them handle it. I would not try to be my own police force.

Mr. Renwick: So your use is limited to the hiring process for those employees that may be working in your vault.

Mr. Berman: Sensitive areas, yes.

Mr. Renwick: Sensitive areas.

Mr. Berman: That is right. I believe that is what most of the jewelry industry uses it for as well.

Mr. Renwick: When you say you use it, do you retain a firm--

Mr. Berman: Yes, we send them out to a polygraph firm. I guess my feelings are, from what I understand there is no regulation on these people at all right now. Is that correct? My feeling is there should be regulation on them, but outright banning seems a bit strong.

Mr. Renwick: Then when you are going to use them, you make the decision as a matter of policy that a person in a sensitive area in your plant who applies for employment will be asked to take a polygraph test.

Mr. Berman: Only the ones we would narrow down the job to. So if it is between two or three people, we would then send them out and then we would talk about everything and then make a decision on who we would hire.

Mr. Renwick: Having sent them out, and having taken the test, you get a report back.

Mr. Berman: Yes, I get a general description that they made out their application correctly. That is the main thing and that they may have stolen something small when they were a kid or something, but they are honest. It is a general statement to see we are not hiring someone who has lied to us on our application form or something like that.

Mr. Renwick: You then accept the report from the polygraph testing firm.

Mr. Berman: We have never had anyone fail it. We have never had anyone where we have questioned, where we have had any problem. But, I suppose if we had someone who did not do well on it, I suppose we would talk to them and ask them if they wanted to take it again because of a problem or what was the story. I cannot see us just saying: "No, you are not going to be employed here because you failed your polygraph test."

Mr. Renwick: You stuck by the one sentence at the beginning of your third paragraph. "We are not aware of any other tools that can be used to any greater degree of reliability at a similar cost factor which can measure the honesty of potential employees."

What is the cost factor that is involved in the test?

Mr. Berman: I do not know. I think it is about \$40. Is that right? It is \$40.

Mr. Renwick: You might use it once a year, 10 times a year, five times a year?

Mr. Berman: It depends on our turnover in staff and our increase. I suppose between three and eight times a year.

Mr. Renwick: Between?

Mr. Berman: Say three, five, eight times a year.

Mr. Renwick: A year.

Mr. Berman: It is not used an awful lot.

J-1020-1 follows



~~...over in staff and our increase I suppose between three and eight times a year.~~

~~Mr. Renwick: Between?~~

~~Mr. Berman: Say three, five, eight times a year.~~

~~Mr. Renwick: A year.~~

Mr. Berman: ~~It is not used as a guide.~~ We only use it in a specific area.

Mr. Renwick: Thank you Mr. Chairman.

Mr. Mitchell: It flows from the questions Mr. Renwick asked Mr. Chairman, and you might correct me if I am wrong, but I got the impression that these employees when they are sent for the polygraph tests, the questions posed to them are only questions based on their application form. Is that right or am I wrong?

Mr. Berman: I do not know.

Mr. Mitchell: Pardon me for pursuing you, but I thought I heard you say that they will come back to you with a verbal report on whether or not what they had stated on their application form was accurate, which leads me to believe then that the questions would be based on the application form. You yourself are not aware? Are you aware at all of the types of questions they ask the possible employees?

Mr. Berman: I think I had a list of them once. I do not use it as a real crucial thing. If there is something the matter, anything that is not good about an employee, I will then delve into it and find out what is going on. Basically the report is this personal makeup.

Mr. Mitchell: That is a verbal report is it?

Mr. Berman: That is correct.

Mr. Mitchell: Thank you Mr. Chairman.

Mr. Mackenzie: I just wanted to be sure that I understood you correctly. You are not using it for all of your employees. You are using it only for employees in a sensitive area?

Mr. Berman: Yes. The way most manufacturers work is all the jobs are kept track of by weight and by bag throughout the place. So once things are inventoried in that way, you do not really have a problem, even if we had someone who is prone to steal an awful lot, we can track it at that point, because the numbers do not match from point to point. It is primarily in an area where things are being counted to be put in there to begin with. Things where the inventory cannot keep track of it exactly is where I cannot take a chance on anyone who I consider to be potentially dishonest.

Mr. Mackenzie: Would you give this test to everybody who applied for a sensitive job or not?

Mr. Berman: Our policy is that we made this department. Anyone who wants a job in that department has to go through that test, that is correct.

Mr. Spensieri: In your typical interview situation, you would interview a large number of applicants and then you would get down to what is a short list because some would fall by the wayside in any event. That is part of your interview. When you are down to your short list, have you ever had situations where a person has been automatically excluded simply because he appears unwilling, unable or somewhat reluctant to take a test? In other words, what I am getting at is the mere unwillingness on the part of an applicant for whatever reasons, to participate in a polygraph. Is that going to be in your estimation and as a perspective employer, is that what determines the end of his interview sort of thing?

Mr. Berman: We have not had a situation where we have had a short list where anyone has said, no. I suppose it is mentioned in the initial interview. We lay out what the job is all about and we tell them it is in the vault, in a sensitive area and by the way if you are chosen as one of the people who are potentially for this job, we will request that you have this test. We have never had anyone who said no. I suppose that if someone knew that they did not fill out their application correctly and so on, they would have turned down the job at that point onward, not go any further. So I suppose there is--

J-1020-1 follows



~~Mr. Berman:~~

~~... did not fill out their application correctly and so on, would
be turned down the job at that point, and said, "No, I will
not go any further."~~

Mr. Spensieri: It is fair to say that you would always exercise your employer's prerogative in a negative way towards someone who appeared unwilling. Would that not be the case? I know you have not had the actual situation, but if it were to arise, someone who is obviously qualified. You have considered him. He is down to the final strokes, and then he says, "I just will not take a polygraph, I am sorry." There is nothing improper about how you exercise your employer's prerogative but that is the end of the interview for all purposes, is it not?

Mr. Berman: I would find out why. Is it on principle? What is the problem? If there was no good reason, I would tend to suspect them.

Mr. Mitchell: If I may just follow with one question, you say you get the report from the firm doing the testing, verbally. What happens to the polygraph tapes? Although I have never gone through it, I would suspect the tape being done, if they should get it mixed up with others within the facility, must bear the person's name. Again, not knowing the system, I would presume the person carrying out the test would be making some markings on that tape. What is done with that?

Mr. Berman: I do not know. I rely on the person doing those things. I would agree there should be regulation on those people.

Mr. Mitchell: But you do not, yourself, lay any conditions on the testing organization as to what should happen to these records once the testing is completed.

Mr. Berman: No, I do not.

Mr. Mitchell: You are not aware then whether they would continue to maintain a written copy of the information which they have passed to you verbally?

Mr. Berman: The fellow who does it is here. Perhaps you could ask him. I do not know.

Mr. Gillies: I very much appreciate the points that Mr. Berman has made. We should keep in mind, as we go through the cases and examples that will be brought forward regarding this bill, that I do not think there is a typical case. Different employers have used the polygraph in different ways. Some screen all prospective employees. Some screen, as Mr. Berman indicated, employees in a particularly sensitive area. Some do not use it as a screening device at all, but use it later in trying to determine activity within the company from people who are already employed there. There are a number of different scenarios.

(Mr. Gillies)

Mr. Berman has touched on two very important points that I would like to respond to briefly if I might.

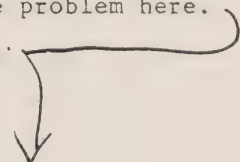
One is the accuracy question. Our ministry readily accepts that to the best of our knowledge the polygraph is the most accurate "lie detector" available. But even the most optimistic would not give it more than about a 90 per cent accuracy rate.

As all members of the committee know, no machine, polygraph or psychological stress evaluator, or anything else, actually detects lies. What the machine does is measure various types of stress. If we attach to the polygraph a high end accuracy rate of 90 per cent, let us take for example a company of 1,000 employees at which 50 are pilferers, 50 are not acting in the best interests of the company. If all of the employees at a 1,000-employee company were subjected to a polygraph test, and that test was 90 per cent accurate, 35 of the 50 errant employees would be caught with that 90 per cent accuracy rate, and it would be relatively effective in that regard.

However, there would also be 95 additional employees at a 90 per cent accuracy rate who are not guilty of the errant behaviour who would also register on the machine as being guilty when they are not. Even if you accept a 95 per cent accuracy rate, there would still, in a 1,000-employee case, be as many detected as being errant as not errant. There is a considerable problem here.

~~Mr. Renwick: I always appreciate the committee.~~

J-1030-1 follows



(~~CONFIDENTIAL~~)

~~will be a 100% employee case, as many detected as being
current is not errant. There is a considerable problem.~~

Mr. Renwick: I always appreciate the remarks of the parliamentary assistant but perhaps he would do us the courtesy of allowing the members of the committee to listen to the submissions and make up their minds about it. If we want to question the parliamentary assistant about his knowledge of this matter we can consider then whether he should have an oath administered to him so that we can test the accuracy of his credibility as a recent specialist in this matter. Perhaps if we heard the submissions, the members themselves could assess some of these matters.

Mr. Gillies: I am at the disposal of the committee.

Mr. Chairman: I think we can follow that procedure. I would probably have to question Mr. ??Robinson. Thank you Mr. Berman for coming here and making your presentation. We appreciate it very much.

ONTARIO ASSOCIATION OF POLYGRAPH
AND AUDIOSTRESS ANALYSTS

Mr. Chairman: The next group is the Ontario Association of Polygraph and Audiostress Analysts, Mr. Peter Fallis counsel, and Colonel C. R. McQuiston, United States Army. Would you please come to the table?

Mr. Fallis: My name is Peter Fallis. I am acting as counsel for the Ontario Association of Polygraph and Audiostress Analysts. I have with me, as part of the association, Colonel C. R. McQuiston, a retired colonel from the US Army, chief of intelligence services, who is very knowledgeable in the area of polygraph and vaudiostress analysis and he will be talking to you about the technical part of the equipment. I think you will benefit greatly by the information he can relate to your committee.

Mr. Renwick: Did you say retired?

Mr. Fallis: He is now retired.

I might indicate to the committee members that you have before you a brief and submission that has been prepared and I intend to follow it more in a highlighting manner rather than reading it.

The association, as indicated in the brief, is comprised of individual professionals who make their livelihood from operating the truth detection equipment. I would stress that the name lie detection is misnomer which has a negative impact. The equipment is basically a device for verification, if you will, checking credibility. They are really truth detectors. If you look at the positive points of it, you will be persuaded that this is a better name for the equipment.

(Mr. Fellis)

The association carries on practices as professionals within industry and commerce. Their services are usually required in three general areas.

First is to assist employers in verifying the information supplied by applicants for work. They are often asked to validate the information. It saves a lot of cost than going through the conventional means of following up. It is a simplistic way of going about it.

Second, members are requested from time to time to carry on periodic testing of personnel to confirm that they continue to be truthful and honest in the course of their employment. This service provides an ongoing security program which acts as a deterrent to employee dishonesty. As Mr. Berman indicated previously, it is something he feels serves a useful role.

From time to time the third function is asked of the members of the industry and that is to conduct security checks in the event of incidents that may be of a criminal or important nature, inventory or cash shortages, and these tests assist employees by showing the credibility and honesty of individual employees and removes the cloud of suspicion from that innocent staff.

Basically, the way the industry works presently, it offers a service to employees and to employers which allows them to work in harmony with other employees and to work in concert with management and the employers affording a built-in deterrent effect on an ongoing basis.

J-1035-1 follows



November 2, 1983

(Mr. Fallis)

~~allows him to work in harmony with other employees and to work in
concert with management and the employer attending a lie detector
test on an ongoing basis.~~

If I may, I would like to have you look at the bill and I think that it might indicate, the parliamentary assistant has attempted to summarize the bill. I find his summary too brief as he left out one very important section. The section of the bill which the committee and our association find to offend, and I am not saying that all of the bill is offensive. It is only parts of the bill that are, but basically subsection 39(b). If you look at the bill, you will notice that subsection 39(b) has really three subsections and it is each of those subsections that I would like you to study.

The first subsection deals with employees and it states, "An employee has the right not to take or to be asked or required to take or submit to a lie detector test." The parts of the bill that our association finds offensive is the word "to be asked." We are saying that employees should have the right to say, "No, I do not want to take a test." That is a right which we are prepared to concede, but the words "to be asked" are offensive and I will come back to those in a moment.

The second section states, "No person shall require, request, enable or influence, directly or indirectly an employee to take or submit to a lie detector test." ??I will also start by indicating a situation to you which I think you will find extremely useful in your evaluation of that subsection.

Earlier this year in the town of Mount Forest where I practise, my partner had occasion to receive a girl in the office who had made an appointment who had been dismissed from work. She was a staff member of the Canadian Tire store and she had worked somewhat less than a year. She was dismissed because the management alleged that she was stealing money from the till. They reported it to the police and the police have it under active investigation. She came in and said to my partner Brian, "I did not do it. What do I do?" My partner suggested, "If you say you did not do it, let us volunteer you to take a lie detector test." She said, "That would be a great idea. I would be pleased to do that and I hope the other staff will do it too so we can find out who the perpetrator was."

That was communicated to the lawyer--because correspondence had taken place at that point--for the employer and to the police and that fact that she volunteered to take a test so impressed the employer and his lawyer that they did not persist any longer in denying the wrongful dismissal and stopped the police from investigating, they were impressed enough by her.

I want to point out that section, before doing it, I would like to just point out to you that section 59 of the Employment Standards Act provides a \$10,000 and a six-month jail sentence for any violation of any section of the act, of which this is one.

(Mr. Fallis)

That section says, "No person shall require, request, enable or influence an employee to take or submit to a lie detector test." My partner Brian Sweet requested her to take a test, he enabled her to take a test, he influenced her to take a test. That section would convict my partner and my law firm for advising an employee to take a test to protect her rights to prove her innocence.

I would suggest to you that is a complete violation of the right of every individual and employee in this province and it offends the Charter of Rights and the Constitution. It directly contravenes the Canadian Charter of Rights which this province voted for two years ago and supported when it was passed. I suggest that it is entirely unconstitutional.

Now not only does that affect a lawyer, but it equally affects a policeman who may, not in the course of the investigation, but may ask a test to be taken. It may not be an investigation, it can offend anyone else. Therefore, that section too, no person includes an employer, an employee's lawyer, anybody acting for an employee, nobody can make the request to ask someone to take a test. Therefore, it denies the employee the right to be advised of the right to take a test because nobody can make that statement ever. It offends the freedom of expression in the Canadian Charter--

J-1040 follows



~~to ask persons to take a test. Therefore, it denies the employee the right to be advised of the right to take a test because nobody can make statements over. It offends the freedom of expression in the Canadian Charter of Rights and Freedoms under the Constitution Act.~~

That is subsection 2. I invite you to look at subsection 3 and it says, "No person shall communicate or disclose to an employer that an employee has taken a lie detector test, or communicate or disclose to an employer the results of that test." That section deals with communication and expression. I suggest to you that section has to be struck in its entirety. The association again would be content to allow the statement in subsection that "No person shall require an employee, directly or indirectly, to take a test." That as a requirement, in other words, it cannot be made mandatory in any pre-employment or during an employment setting.

As far as the request, enable or influence, I suggest that offends all the Charter of Rights that we have. So the words "request, enable or influence" must, in our submission, be removed from that subsection.

Subsection 3 states as follows as I have read to you: "No person shall communicate or disclose to an employer the fact that a test has been taken, nor the results of that test." If you look at that subsection in view of this particular circumstance which a friend of mine who is a lawyer in Kitchener had, and that involved a young girl last year who was employed at a high dollar volume, fast food outlet in the city of Kitchener. She became a very prime suspect in a cash shortage that was occurring at that store involving many thousands of dollars.

The employer owner went to the police and the police investigated it and came to her. She was so shocked by it that she went to see her lawyer who was a friend of mine and he volunteered and suggested to that girl, as did my partner Brian Sweet to the other employee, that she submit to a lie detector test. This girl did and those tests demonstrated clearly that she was, had been and continued to be an honest and credible employee and person, that she was telling the truth.

That lawyer presented the results of that test to her employer and to the police, and her employer was so impressed by the results of that test that she was invited to continue her employment and the police looked elsewhere to investigate the crime. Ultimately it was resolved by the police ascertaining that it was a management personnel who was the perpetrator of the crime and had caused the facts to be orchestrated in such a way that it removed the suspicion to this particular girl.

I want to use that circumstance to look at subsection 3. No person--who is a person? That employee is a person and that subsection 3 would deny that young girl in Kitchener-Waterloo the right to communicate the results of that test to her own employer.

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(Mr. Fallis)

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17 November 2, 1983


It would deny her the right to advise the employer that she had even taken a test. Under the section she could be fined and charged up to \$10,000 and serve six months in jail for attempting to prove her innocence.

I suggest to you that this legislation that has been passed has been drafted by draftsmen with long white skinny fingers who know nothing about civil rights because that offends the rights of the honest employee. I suggest that is exactly what it does.

It impacts directly and adversely upon the rights of every honest and truthful employee in Ontario. It abrogates, annuls, abolishes and repeals the right of every employee to use the means of a lie detector test to establish his credibility, honesty and truthfulness before any employer, either upon application or during the course of employment.

The parliamentary assistant attempted to describe to you the origins of the legislation. I suggest to you that the origins happened in this scenario. In the early 1970s there were problems--

J-1045 follows



(Mr. Fallis)

~~The parliamentary assistant described to you the origins of the legislation. I suggest to you the original proposed in this section.~~

~~In the early 1970s there were problems with the metropolitan police force in the city of Toronto which warranted the establishment of a commission headed by Mr. Justice Morand. Mr. Justice Morand was asked to look at police activities in the city of Toronto, and the city of Toronto police force, which was basically on trial in that hearing, had to hire counsel. They hired counsel at that time, who was Roy McMurtry.~~

Roy McMurtry became swept up in justifying the police's actions and, in the course of the hearings, testimony came forward about people who had been injured at the hands of the police. They submitted to lie detectors and the police were put into the position where they had to knock the pins out from under the lie detector tests, and that was Roy McMurtry's job. This subsequently became a subject of comment in the Morand hearings and in his report. He carried that forward into his position as Attorney General of this province.

I would point out that those hearings had nothing to do with employment; they had to do with policing in Toronto. In his letter, which is appended to my report at pages 16 and 17, a letter that he sent to Dr. Silverberg, he openly admits this in 1976.

He said, "After reading the material and literature before the Morand commission"--he did not have to read it, he was there, he was making his submissions--"I have concluded that polygraphs should not be used in the employment context. I have referred the matter to the Minister of Labour and I and my officials have been in contact with the ministry on this matter throughout the intervening years."

The pressures come from him. I would suggest to you that the only justification that the minister has, which is again attached to the appendix to my material, is a letter that was handed out on September 30 by Honourable Mr. Ramsay, the Minister of Labour, there is a list attached, examples of types of concerns raised by the minister with respect to lie detectors. If you look at that list, and I invite you to do so, you will notice that they are not concerns and they are not complaints, they are merely statements of where it is used.

I indicate to you that one of my clients, as a matter of course, when questioned about the legality of the test by prospective candidates for examination, has always invited those candidates to call the Ministry of Labour and to verify that there is nothing in law to prevent such tests being taken.

It becomes obvious when you read that list that the ministry has catalogued those inquiries and has presented them as complaints to now justify the passage of Bill 68. I suggest that

(Mr. Fallis)

it is presented to the House without any real verification. In fact, our industry would know if there was a problem. In canvassing the members of it and the association itself, not one member can ever recall being contacted by any member of the Ministry of Labour or any government official on any of the listed complaints mentioned by the minister in that catalogue which I have appended to the submission.


Somewhere there seems to be a theory or something in the Ministry of Labour that they feel a lie detector test is an infringement upon the unwritten code of workers' rights. Somehow they have persuaded themselves that these tests somehow are an infringement upon the rights of privacy, that they are the syndrome of Big Brother is watching you.

The ministry has been unable to chronicle and set out a fully documented and reported case in point. In response to our request for such a case, the only thing they proffered in evidence was the list which I have told you about.

The consequences of this bill on the polygraph industry, I think, must be looked at. The consequential effect will be to wipe out the industry; that is how they make their living. That is a pretty self-serving statement, I suppose, but it is true. These members are men who have devoted their lives, they earn livings for their families and so forth. They are professionals and they are proud of their profession. They are not out to deceive or impede anything; they are out to offer a truth verification service to members of the commercial and industrial community who require it.

As far as they are concerned, they feel . .

(Tape J-1050 follows)



60
(Mr. Fallis)

~~... and industrial committees ... require it.~~
~~As far as they are concerned, they feel~~ that the committee and the members of the Legislature who have dealt with this, have dealt with this in a vacuum of noninformation and that basically the members of the Legislature and of all parties, and reading Hansard, I know that all three parties supported the bill. So I suppose I am talking to everybody and not just talking to one party, so I think we can eliminate party politics from this discussion altogether.

Just the use of the term "lie detector" rings, by banning it, you are eliminating a lie detector test which has been viewed as obnoxious and unreliable personnel screening devices that offend workers' rights and privacies.

The parliamentary assistant has referred to percentages and I suggest to him that percentages are like averages, and averages are interesting.

When I was in law school I heard a professor say that statistics are interesting. It is like a girl's bikini: What it reveals is interesting but with it hides is vital and I suggest that is exactly what his statistics are doing as well. A person can suffer from the use of statistics and I suggest I would ignore that suggestion.

What is at stake here are basically the rights of an honest employee. We suggest that if Bill 68 becomes law, this government and members of the Legislature who will vote in favour of this bill in the alleged praise of workers' rights and privacy, by totally and forever abolishing lie detector tests as a personnel screening device, will thereby be placing upon the sacrificial altar before this House the rights of each credible, truthful and honest employee in the province and will be offering in sacrifice by prohibition the right of each such employee to prove himself or herself truthful and honest by means of such tests, by prohibiting that individual from communicating the fact that he or she has taken the test to his or her employer and specifically preventing him from communicating the results of such a test to his or her employer, be that employer past, present or prospective.

I would suggest that it also violates the rights of every honest employee because his lawyer, when hearing of a circumstance which may cause that employer to go into a law office, will be prohibited at the risk of a \$10,000 fine and six months in jail from advising that client to take a lie detector test.

What started out as a royal commission on policing practices in Metropolitan Toronto in 1975 had nothing to do with the rights of an employee has a resulted in the rights of honest, credible and truthful employees being made the sacrificial lamb in 1983. Surely the honest employee has rights too.

(Mr. Fallis)


We have invited your committee to study those rights and to look at the devastating effect and denial of natural justice that such an honest employee will be made to lose and suffer as a result of the implementation.

Our law firm has been asked by the association to research the legality of Bill 68. We offer the following conclusion: Subsection 39(b) of the proposed employment of the proposed employment standards act, which is Bill 68, violates, breaches and is in contravention of the Canadian Charter of Rights and Freedoms and to the extent of such contraventions is unlawful, may not be passed by the Legislature, and if so passed, such contraventions would be declared unlawful upon appropriate application to the courts.

I have set out in the submission before you the reasons that allowed us to arrive at such a conclusion. I have also indicated to you that the first two subsections, there were words that offended the Canadian Charter. One was in subsection (1), the words "or be asked." In subsection (2) the words "request, enable or influence,"

On page 9 of the written submission at the bottom I set out a photocopy of that part of the Constitutional Act which is a section of the Canadian Charter of Rights and Freedoms and I think in view of what Judge Ross said yesterday in his decision on the metrification of gasoline sales, that those statements made by him in his two-hour judgement should be read by all of us. I have not had the opportunity to read them, but he struck the chord that what was at stake was the freedom of expression? . . .

0-1055-1 follows



(Mr. Fallis)

~~...that those statements made by him in his two-hour judgment should be read by all of us. I have not had the opportunity of reading them, but he struck the core that was at stake with the freedom of expression? In that case, how to express, how to sell a gallon of gas, a litre of gas or a measurement of gas. That was a denial of a right of expression.~~

I suggest to you that section 2 of the Charter of Rights and Freedoms which says this: "Everyone has the following fundamental freedoms, freedom of thought, belief, opinion and expression, including freedom of the press and other media communication."

What more cherished freedom could there be than the right to ask a question? Are we offending our common senses by the right to ask a question? That is what subsection 39(b)(1) says and advises. Nobody can even ask an employee to ask a question. The question, obviously, that the employer would ask would be: "Will you take or submit to a lie detector test?" What is so offensive that warrants a \$10,000 fine and six months in jail for asking that question? Surely you have the right to ask.

We can see that the employee does not have to answer and we would ask that that provision be left in there where he does not have to take a test. That is fine.

Subsection 39(b)(2) also says: "No person shall request the neighbour or influence." Again, that violates the freedom of expression. That affects me as a lawyer. I cannot even advise my clients to take one because I am going to be subject to a \$10,000 fine and six months in jail. I owe my family a bigger rate than that. I think I would decline to make that advice because I have to put bread on my table for my family too.

Subsection 39(b)(3) is the one that is entirely offensive. I suggest that it is totally unlawful, and in total contravention of the Canadian Charter of Rights and Freedoms.

This section applies not only to professional analysts and examiners who may not ask or disclose the test, but it applies equally to a policeman or to the employee himself. I say the real affront to this section that not even the very employee himself may volunteer to undertake such a test to purge suspicion or verify his honesty. He cannot disclose those results to his employer.

I suggest to you that I cannot believe that that girl in Kitchener that I described should suffer the risk of a \$10,000 fine and six months in jail for raising herself above suspicion by providing the results of the test to her employer. The only sordid thing missing from this subsection is a retroactive clause so that this innocent, young, high school graduate who undertook a lie detector test to remove herself from the cloud of suspicion upon her should be punished for demonstrating to her employer that she had been honest and truthful all along.

(Mr. Fallis)


To that, gentlemen, I say God forbid.

In conclusion I wish to indicate to the gentlemen that we are here today because of the fact that the minister refused to meet with us. We asked for the opportunity to attend before the minister. He invited us to an early morning meeting on September 30 and then announced at the meeting that he was going to pass the bill on second reading in any event and we should go to see him in committee afterwards. The cattle are almost out when the barn door is opened. I am saying that I hope you gentlemen can assist us by closing what is obviously an injustice. Basically, you are the last hope in this legislative process, as far as we are concerned.

It is a sad day when the only justification that can be given for a lie detector test is a personnel screening device, either catalogued of unsubstantiated observations called complaints that have been, for the most part, really inquiries made to the ministry. Second, they are the whims and musings of a former counsel of the Metropolitan Toronto Police Force, and now Attorney General (Mr. McMurtry) arising from the 1975 hearings into police activities in Toronto which had absolutely nothing to do with employment standards.

I would therefore urge each member of this committee to forget about the party system, to vote on this by their consciences. On behalf of every honest and truthful employee in Ontario I urge that you give this submission your complete support. That young girl from Kitchener-Waterloo represents the interest of every hardworking, Godfearing--

(Tape (J-1100 follows))



(Mr. Fallis)

~~... vote on this by your conscience. On behalf of every honest and truthful employee in Ontario, I urge that you give this submission your complete support.~~

~~That young girl from Kitchener-Waterloo represents the interests of every hardworking, God-fearing, honest and truthful employee in Ontario. He, she and others like them are the backbone and fabric of this country. They are your constituents, your neighbours and your family. Do not deny them the right to which they are entitled and for which they have worked so hard; namely, the right to demonstrate their credibility, honesty and truthfulness to their employer by the means of a lie detector test.~~

I urge you to ask yourself what wrong the legislation is seeking to remedy by prohibiting the right of an honest employee to communicate to his employer that he has taken a lie detector test and to communicate the results to his employer.

The legislation clearly is wrong. It is sufficient to allow legislation to remove lie detector tests as a requirement for present or future employment. No further changes are required.

I have set out on page 14--if somebody wishes to be persuaded by our submission--the changes that could be made to comply with the request of the association. You will notice that the only subsection that we even ask to be changed is subsection 39(b) by deleting several words in subsection 39(b)(1), several words in subsection 39(b)(2), and deleting subsection 39(b)(3) in its entirety.

Mr. Chairman, you did make mention of the fact about the hearings going on into next week. There were some invitations extended by the Ministry of Labour to different organizations on September 30, one of which was to the Canadian Association of Police Polygraphers to which you have referred.

It was only as a result of a call that was made on Monday morning by myself to the Ottawa office--the RCMP officers from the Canadian Police College at Ottawa are basically the people who look after that--that they learned of it. Nobody called them; nobody told them to come. There are other people out there. Yesterday morning, we talked to people at Sovereign Jewellery who said they did not even know of it. We thought we would hear from somebody--it has been very quiet.

One of the problems that you have is that there has been a ??cross of silence on it. People who want to impart knowledge do not even know we are here today. The RCMP are in a very awkward position and I would invite your committee to do something to alleviate that awkwardness. ??Governed by their constitution and by their enactment, they are not allowed to lobby. They cannot come here voluntarily. However, I suggest they would come if your committee would call the RCMP in Ottawa--I can assist by giving the secretary of your ?? committee the name and address--they

(Mr. Fallis)

would come on your invitation to give you some evidence. They sure feel strongly about it, but they cannot say anything.


I think that your committee is a vehicle and we certainly welcome it. It is an opportunity to talk and discuss, and I hope you will have some questions.

The last item I would like to leave with your committee is this. You say, basically, give the worker the right not to take it. Second, make sure that no employers can require it to be taken, but do not deny them the right to ask.

In the area of accuracy, the one problem is the profession itself. The members who make up the association which I represent are individuals who recognize that there has got to be a level of competence in the industry. They would welcome the government's intervention by developing guidelines for the training, standardization of equipment, licencing of operators, development of procedures and establishment of an administrative board for the industry. They would welcome this. They would like to work with you in the development of this.

Mr. Chairman, I am going to hand over to you an appendix to that submission. It is a copy of some model licencing legislation which I have. I would indicate that I am not going to tell you what it is other than to advise you that I have it. I have one for the Business and Professional Code, Polygraph Examiners Act, passed just March of this year for the state of California; the Detection and Deception, Examiners Act, for the state of Illinois, and the regulations that they have passed under it, which were passed a couple of years ago. The state of Louisiana has a Certified Stress Analyst Act, also presently under consideration in Arkansas and Nebraska....

0-1105-1 follows.



...the state of Louisiana has the Qualified Stress Analysts Act, also presently under consideration in Arkansas and Nebraska; the Polygraph Examiners Act from the state of Oregon, Polygraphic Examiners' Licensing Act in the state of Vermont; in the state of Virginia, the Virginia Polygraph Examiners Licensing Act. I have 20 copies that break my poor little office so I leave you with one.

Mr. Chairman: Thank you very much.

Mr. Fallis: Those gentlemen, basically are my submissions. I wish you God speed and good luck in your deliberations and your task. I invite any questions you may have.

Mr. Chairman: Thank you, Mr. Fallis. Before we go to the questions, I was wondering whether Colonel McQuiston had anything to add to your presentation.

Colonel McQuiston: Gentlemen, I have been asked to provide information to you based on my experience on polygraph psychological stress evaluator and its testing technique. I should think that all of the percentage questions, the structuring of the examination, I would be able to inform you and give you definite answers, also to the written or verbal reports from certain agencies. I am a licensed polygrapher in Florida and Virginia and a licensed stress analyst in Nebraska and Louisiana. I am the president of the International Society of Stress Analysts, which is our professional society. Some members of the Ontario group belong to that organization.

To date at best count, I have run approximately 1,000 polygraph examinations and I have run over 30,000 psychological stress evaluators. I would suspect that because of presence alone I have information that you might require. I would entertain any questions and try to supply that information to you.

Mr. Chairman: Thank you, sir. I think the first questioner was Mr. Mitchell.

Mr. Mitchell: Mr. Fallis, I recognize the cases that you brought before us with regard to the employees who approached your office and, in fact, wanted to take a lie detector test to clear themselves of being suspect in particular situations. I do not see this bill as being one that would in any way affect you or your office or put your office in jeopardy ??because what we are amending today, if this bill should carry is the Employment Standards Act.

What is, in my understanding, the intent of this bill is to ensure that all employees have the same rights when they are applying for a job. Secondly, I suppose indirectly it is expressing a concern that many members have is that--and I do not want to get into great argument about it at this time because certainly I am not a specialist--many tests might be carried out by people who are less than specialists in the field.

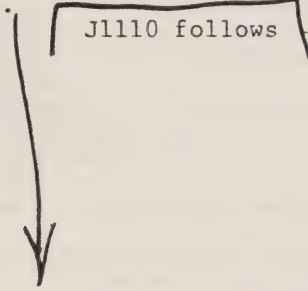
You have also, quite clearly, quoted the Charter of Rights and Freedoms. Surely, under your fundamental freedoms that you chose to read, implicit in there is the freedom of an employee to make certain choices. By making those choices, not have the fact that he refuse to be the main criteria to his getting a job. Second, I would also say that under the Equality of Rights section, every individual is equal before and under the law and has the right to equal protection and equal benefit.

Again, I am not a lawyer--I do not know how many companies are using lie detectors. I suggest to you I was never submitted to one when I worked with the federal government, although I was in a position of high security. I was never once asked to take one so I was not forced to take one but another employee looking for a job for a fast food outlet or whatnot is asked to. Is that equality?

So I suggest to you your arguments on freedoms and equality can be used in the reverse. I guess really that is the amount of my comment. I do not see you losing the right that your partner had in the law firm in allowing the client to take a lie test or truth detector test, as you corrected it. I do not see that as an effect. I see that what we are doing here are basically amendments to the Employment Standards Act.

Mr. Fallis: I want to stress, Mr. Mitchell, that we recognize that it should be made a right for employees not to be required to take it...

J1110 follows



Mr. Fallis: ~~Mr. Mitchell, I want to stress that it should be made right for an employment not to be required to take it and that he has a right to refuse to take it. That would alleviate that concern. If he does not want to take it, for whatever reasons, it cannot be made the subject of dismissal. I would say that we would certainly be happy with that.~~

It is just that what you are doing is denying the right--it is not equal--of an employer to ask to take a test. The employee has the right to ask but the employer does not. Is that equal, when one does not and one does? The Charter of Rights is there for employers as well as employees.

Mr. Mitchell: If I may just respond to that, the problem is that the employer may ask the employee to take the test but my concern is that he will make that the major criteria of turning that employee down should he refuse for whatever principle to take the test. Let us assume that the employee feels that the people who would take the test may not be, for example, as competent as the colonel who is with you today. I am assuming his qualifications on the basis of the information he provided to us. But you see that is the worry to me that the employee says: "I would rather not because of these certain believes" but the mere fact he has refused, the employer crosses him automatically off the list of possible employees.

Colonel McQuiston: May I address that question? This is also a great fear of mine. I have devoted many years to try to make this profession as professional as possible to eliminate those examiners who are not qualified to do it. The International Society is dedicated that ?? in the United States. I have the same fear. For that reason we have severely concentrated on the context of the examination. When a professional polygraphist or stress analyst goes to the employer, he should only do that on the basis that this may not be used as the principle means for dismissing the application of an individual.

Obviously, you cannot police how that individual thinks. But as far as the polygraph profession is concerned, it is an investigative tool to be used in a total employment process, not to be taken by itself. The employee who has failed a polygraph examination, it should be taken professionally only in one context--that that source, that instrument of the investigative process has now been denied to the investigators. So it must be supplanted with the long inductive process of background checks, police record checks and it could go on for months and months. But that is open to the individual.

I cannot answer for all of the employers who would say, "Aha, he failed it, get rid of him." I cannot answer for that. This is entirely up to the human nature of the people involved, yes. But what you are talking about is transgressions against morality. We are much interested in this also. We do not want to have this succeed to that particular status. We fight it as much as we possibly but a lot of this will be alleviated if Canada, if

the province will accept this profession. We will set out the guidelines, we will issue the licensing and have the control board to make certain that those practices do not occur.

Do not dismiss the technique and the instrumentation because it could be used to do evil. Simply make the legislation available to punish the transgressors, as we would in any other profession. That is how you police. The technique is extremely valuable. It renders an excellent service in an investigative capacity. Do not just per se say, "This could be used for evil." Of course it could be used for evil. So we are dealing with human personality.

If we ensure that you have a professional motivated experienced examiner to do the job and he is licensed and he is controlled, as other professionals, is that not about as far as we can go. Sure, we are interested in the morality of it--

Mr. Mitchell: But with respect, Colonel, that was not the direction of my question. My question was basically: When somebody has gone in and made an application for employment, there is a job there. My concern is that if he is asked to take a test and for whatever reason decides that he cannot do it--I have seen students go in to take examinations who just, for whatever reason, just cannot do it..

J1120 follows

~~...asked to take a test and for whatever reason decided that he~~
~~can't do it. I have seen students go on to take examinations who~~
~~for whatever reason just cannot do it.~~ It may be a number one
student orally or in other ways in the classroom, but when it
comes time to sit down and right on that piece of paper, I have
seen them go to pieces or have heard of them.

Colonel McQuiston: There are other means available to
satisfy that ??

Mr. Mitchell: But the employer--my concern is that the
employer--if the applicant says, "I do not wish to take a test,"
ends it there by crossing that person off his list as a possible
employee.

Colonel McQuiston: This is a possibility under the
situation as it exists. What is what we want to change as well.

Mr. Mitchell: That is a major concern of the employment
standards and the reason for this--

Colonel McQuiston: On the other hand, if you consider a
long series of background investigations to determine the veracity
of the information on an employment application--we can do this by
bureaucratic files and records and microfilm. We can do this, but
the time element is involved. The employer's desire to hire the
best person available is involved. I grant you that we are dealing
with human personality and he can say, "I am not going to do it."
This is not right. It is a possibility and it is a possibility in
every other profession that you can name.

Mr. Mitchell: Well, colonel, not to prolong it. You know
the old story, "Big Brother is watching." You say it takes time to
find information on the individual. One of the big concerns in the
world today is the whole basis of freedom of information. You
know, and I am sure most of us have the feeling at least that
somewhere on each of us there is an awful accurate and full file
somewhere.

Colonel McQuiston: That is a paranoid fear that perhaps
I have in the United States more than your citizens do.

Mr. Mitchell: Perhaps.

Mr. Renwick: Mr. Chairman, at this point I would like to
direct some questions to Mr. Fallis about his submission rather
than to you at this time.

I thought your opening statement was a very carefully
phrased statement that the Ontario Association of Polygraph and
Voice Stress Analysts is composed of individual professionals who
are trained and qualified in the science of polygraphy and its
analysts and examiners use various sophisticated instruments and
devices for the purpose of recording the variations in heart beat,
blood pressure, muscle reflexes, respiratory movements and voice

for the purpose of attempting to determine the truthfulness of answers and statements made by individuals.

Then your further statement is that this association is opposed to the passage of Bill 68 in its present form. I haven't had the opportunity to read the rest of your brief but I assume that the guts of your brief is in that first submission.

I would like you to explain to me the nature of the association and the composition of individual professionals who are trained and qualified in the science of polygraphy. I don't know anything about the association, nor about what qualifies a person, nor do I know anything about the science of polygraphy.

Mr. Fallis: I can indicate that the people who practise polygraphy in the province are probably under 25 in number. The association was formed because everybody had a common concern. They all worked in that area. That is the background of it.

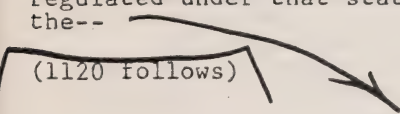
As far as the science of polygraphy is concerned, there are other presenters here who can give you a better answer as to what it is. Dr. Silverberg is one of the leading experts in Canada. He can address that. I am a layman like you, and I cannot give you the clinic answers as to what polygraphy is.

Mr. Renwick: You are aware that we are not entirely devoid in our statutes of the ability of an employer to investigate the background of a potential employee or an employee under our Consumer Reporting Act.

Mr. Fallis: Correct.

Mr. Renwick: You are well aware we do have a facility regulated under that statute by which employers can investigate the--

(1120 follows)



~~...and the law that no have a facility regulated under the statute by which employers can investigate the background of a potential or present employee.~~

Mr. Fallis: I am certainly aware of that.

Mr. Renwick: So it is not as if the employer is devoid of processes which--

Mr. Fallis: I would agree. The employment setting is one that, as Colonel McQuiston indicated, most employers want to get the best person in the hiring process. They don't want to miss out on that right person. You use all kinds of criteria to measure and how you get your information is under that act. The only thing that must be remembered is that there are some rights, a few that are left to employers and a lot of them taken away by this Legislature and the federal government, but they have a few left. One is the right to ask a question. That is the bottom line. You can't go below that. You stop them asking a question. The question offends Mr. Mitchell but put in the pan of justice against the right of a person to prove his innocence I think it doesn't weigh very much.

Mr. Renwick: Let me try to ask a further question about that. I was struck by the language you used in the two examples, both the Mount Forest and the Kitchener ones. I was struck by the statement you made, "to prove innocence," that we would be denying a person the right to prove his innocence." I think these were your words--"honest and credible and was telling the truth." Is there anything that allows you to come to that conclusion, that taking such a test is a proof of innocence?

Mr. Fallis: I suppose it is to whom you are presenting it. If you present that to the court, the courts have not been inclined to accept the result, but it is a piece of evidence which in the Kitchener circumstances persuaded the employer and the police--the employer to invite her to continue employment and the police to say, "We were looking in the wrong place," so whether we call it proof or not, it certainly was persuasive.

Mr. Renwick: In neither of those examples were there charges laid.

Mr. Fallis: That is correct. It assisted in somebody not being charged.

Mr. Renwick: I stumble somewhere and I need your help about this.

Mr. Fallis: It is an investigative tool that is used in the process of looking at the validity of applications or the veracity of information. The question seems to ring technical, "how can it prove," maybe Colonel McQuiston may have some comments.

Mr. Renwick: I am speaking only of your submission to us.


Mr. Fallis: I am having to rely on the information that, for example, it did have some persuasive power. Whether it is proof is one thing, but it certainly had the benefit of persuasiveness and it achieved results--in one case, the Mount Forest case, it persuaded the employer to settle on a wrongful dismissal and the police not to proceed because they were impressed by the fact she volunteered. If she was willing to do that, that was good enough for her

Mr. Renwick: What concerns me is the two instances you based your submission on to a large extent both took place in lawyer's office, one in Mount Forest and the one in Kitchener.

Mr. Fallis: Right.

Mr. Renwick: I find it rather strange that a lawyer would suggest to a client that this was the method by which one would prove one's innocence. I would assume that as a lawyer one would assume that one's client was innocent and would take the steps under our judicial system to make certain either that charges were laid or not laid and the matter dealt with in the courts. I would take the position that an employer cannot on suspicion of theft have the right to dismiss an employee. I find it strange that your--

(1125 follows)



(Mr. Renwick)

~~...take the position that an employer cannot on suspicion of theft have the right to discipline an employee. I find it strange that your law firm and the law firm in Kitchener would try to short-circuit that system through the use of this device, which you have already said to me you do not know anything about.~~

Mr. Fallis: No, you misquote me. Do not say that I do not know anything about it. I cannot explain the science. Let me explain it this way. When a client comes into my office--and to be blunt about it--lawyers are all up in the ?? for charging a lot of money, but the meter runs. Toronto firms charge--you hear quite frequently--\$150 to \$200 an hour for people who have?? 10 or 12 years. That meter is running when people are sitting in your office.

If I can assist them by suggesting a way to take a test that will avoid them having to go into that scenario, or persuade people before someone else not to charge them, then that person does not have to incur the cost of the meter running in the courtroom while she is?? in a public forum in front of all her friends in her community where?? she can be convicted and the press are there.

People are often convicted in the press and acquitted in the courtroom but nobody hears of the acquittals. Those are two people who did not get to the courtroom, and I think that their lawyers should be commended for what they did--not to be questioned about, "Gee that is not something I thought a lawyer did."

The only examples I can relate are law-related. I have never been in an employee?? interview, and I think that the men who will be presenting stuff, information after me, can better give you examples in that scenario than I can of--

Mr. Renwick: But the crux of the position which you took on both of the instances which took place in the law firm in Mount Forest and in the law firm in Kitchener was that a client had come to the firm and the lawyer had said, "We suggest or recommend or advise you professionally to go and take a lie detector test." You, in each instance, as I understand it, because the person was successful in passing whatever that test is--using the language of your opening statement--you then said that, therefore, that person is honest and credible and was telling the truth and that we would be denying them the right to prove their innocence.

I am not commending or criticizing at all. I am just saying that I find at passing streams?? that lawyers would try to short-circuit the system, which is involved in establishing the rights of protecting unprotected employees from unlawful dismissal.

Mr. Fallis: If saving two clients thousands of dollars in court, embarrassment of the court is--


Mr. Spensieri: Hallelujah, brother.

Mr. Fallis: --offending the system, then I am all for offending it, Mr. Renwick, because I believe that those two people walked back into their places of employment or into the community proud and exonerated by the process, without a cost out of their pocket or Ontario legal aid plan--where maybe both of them would have had to go because of the cost of paying for lawyers like myself. I am proud of the fact that there are some people left in the profession who do not look at everything through their wallet.

Mr. Renwick: Are you suggesting to the committee that, had the person not been successful in passing the test that that would have been proof of the person's guilt?

Mr. Fallis: No, I am not suggesting that it is proof of the guilt but if I--on a confidential basis--had a client where they took the test and did not pass it--a person in our system has to be proven guilty and I am not out to volunteer proof to the crown. But it would certainly assist me in knowing what case I had to meet. I am not a criminal lawyer so I cannot say how tactical?? use I would make of the results of establishing a deception--I do not know what I would do with it. I am saying that if I have a result that is positive, that exonerates, I think I would like to broadcast that as much as I can to the people, to the--

1130 Follows



36 November 2, 1983

(Mr. Fallis)

~~establishing a deception. I do not know what I would do with it. I~~
~~am saying that if I have a result that is positive that~~
~~unconcealed. I would like to broadcast that as much as I can to the~~
Canadian Tire store or to the other fast food outlet in Kitchener.
I would want that to be out to them as fast as I can. This
legislation prohibits me from doing it, and prohibits the employee
from doing it. Those are pretty severe rights.

To use Mr. Mackenzie's scenario, if that is what you have to
give up to protect the rights of the people on the other side who
have the right to use this information, I say it is worth the
risk. I must stress one thing, and that is that the government has
recently had a policy of going out and fantasizing situations and
passing legislation to cover the fantasies. I have not heard one
situation of one employee who has been denied work exclusively
because of this test. There has not been one example that has been
used and we have asked for those examples, and they have not been
demonstrated.

Second, I use this by parallel example, the province has
passed this horrendous thing which if you have not heard about it
you will, that is this flood plain policy, and it has gone out and
fantasized mythical storms all across this province. It is taking
bites away from people and those are things that have not happened
either. We are plugging loopholes and tilting at windmills. We are
Don Quixoteish about this whole thing.

Let us meet the problem when the problem arises. If the
problem has not arisen, do not take away a bunch of rights of
somebody because that is what is happening. If the government goes
through and passes this bill, the day it is passed you might as
well line the lawyers up the next day because it will be in
divisional court the day after because it is so wrong.

Mr. Renwick: On the charter of rights, I had spoken
briefly in the House on second reading about a concern about the
legal right in item 7 of the charter that everyone has the right
to life, liberty and security of person, and the right not to be
deprived thereof except in accordance with the principles of
fundamental justice. My thought process went to the point that any
use of the polygraph test in a situation of varying degrees of
involuntariness was a denial of the security of the person, and
that the security of the person could only be taken away in
accordance with the principles of fundamental justice.

Mr. Fallis: I would agree with you. That is what we are
saying. It may not be made a requirement, and a prospective
employee has a right to say no, or a past employee has a right to
say no. Those are all covered in the legislation. We are very
content with those words in there.

(Mr. Fallis)

In my brief, on the bottom of page 11, if they took those words out, it would read when you take out the offending words, one would say, "An employee has the right not to take or submit to a lie detector test" and that falls within the four squares or the corners of what you have just read, and (b) "No person shall require directly or indirectly an employee to take or submit to a lie detector test." We are fully prepared to eliminate the involuntariness of it so that those rights to not take it are protected and the ??rights ??required it.

Mr. Renwick: What is voluntary about a person electing to take a lie detector test because they have been deprived of their employment and this is the way in which they are going to be reinstated in their employment? What is voluntary about that?


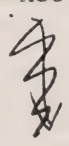
Mr. Fallis: Voluntary is that they do not have to take the test. They have the right not to take it.

Mr. Renwick: Then they will not be reinstated in their employment.

Mr. Fallis: If they do not take it, or if they do it, if there are no results to prove the person wrong, you would have an action for wrongful dismissal. If you were fired for refusing to take it, or dismissed for refusing to take it, the section as we propose the amendment would make that an employer's offense and he could be fined, jailed, and suffer a \$4,000 payment back to the employee under your legislation. We are prepared to allow that.

Mr. Spensieri: As I have always understood the Employment Standards Act, it is concerned with the right of an...

~~...to secure...~~
J-1135-1 follows



~~(Mr. Fallis)~~
~~to allow that~~

Mr. Spensieri: ~~As I have always understood the~~
~~Employment Standards Act, it is concerned with the right of an~~
employee to secure employment, to maintain employment and not to
be unlawfully deprived of that employment. This particular bill
seems to address itself to that. You say that it does more. If, as
a result of employment, certain incidental things happen, such as
potentially criminal charges, you say this proposed amendment
prohibits the use of polygraph tests to fend off or to aid in
either not having those charges laid, or successfully defending
them. I do not think it does that at all. I would like you to show
me where it does that.

It seems to me that if something is incidental to your
employment, such as charges arising from pilfering or theft, and
there are criminal charges about to be laid as a result of that,
which is merely incidental to your employment, you still have all
of your defences. I understood that to be the case, and on the
basis of that I was prepared to go along with the bill, but if you
can prove, in a concrete way, that it affects even things that are
not related to the obtaining, maintenance and continuance of
employment, then we do have a very monstrous thing before us and
we have to consider it.

Mr. Fallis: Subsection 39b(1) deals with the rights of
the employee and other than the words and other than the words "be
asked" they are really referred to in subsection 39b(2). If you
look at the very wording of subsection 39b(2) if you have the bill
in front of you, it says, "No person shall require, request,
enable or influence, directly or indirectly, an employee to take
or submit to a lie detector test." Who is no person?

Mr. Spensieri: Implicit in all of this is the
qualification that it is in so far as it relates to your
employment. Beyond that, by statutory interpretation and by the
normal rules of construction of these types of bills, it cannot go.

Mr. Fallis: Let us say that individual, that employee,
that young girl from Kitchener, of her own volition, walks in to
Mr. Silverberg's office and says, "I want to take a polygraph
test."

Mr. Spensieri: What is it in connection to, the
continuance of her employment, or the potential fear of criminal
charges incidental to her having been employed?

Mr. Fallis: Let us say it is a continuation of her
employment because of the fear of criminal charges. Let us put it
in that context. The foundation is laid for that context.

(Mr. Fallis)

She walks in and say, "I want to take a test." He enables her to take a test because he is a professional and can do it. He is precluded by that legislation from giving her a test because she is an employee, because no person shall enable an employee to take or submit to a lie detector test. That is what the section says. It will not allow him, knowing that she is an employee of that fast food outlet who needs the information about some incident at that outlet, to take the test. He will be denied the right, in law, to enable her to take it and he is the only one who can because he is the professional.


She is denied the right and it is strictly employment related. That section is bad. I suggest that her lawyer also falls into that context. What has happened to the employee, because nobody can talk about lie detector tests when they are employees, that particular employee will not have the opportunity of knowing that she can even do it. Even if she does, she will have to go out of the province to have her rights protected because this section, this Legislature, has taken them away in this province. She would have to have her testing done in Michigan, New York, Quebec, Manitoba or somewhere else, because she cannot do it here.

Mr. Spensieri: Clearly, somewhere along the line there will have to be amendments indicating that this is employment related material only because if it starts going beyond that we have a problem. There are situations. Let us say an employee is accused of pilfering. There is the normal employment consequence, the potential for dismissal. There is an auxiliary potential for criminal charges being laid.

I can easily live with legislation which says, as a consequence of the dismissal we are not going to allow you to submit or to engage in the practice of polygraph related to the continuance of your employment. If you feel aggrieved, go ahead, file your wrongful dismissal claim, go see a lawyer in Mount Albert, file the wrongful dismissal, or take your remedies under the Employment Standards Act which provides for penalties for improper termination. I can live with that.

But if it also takes you to the next step which is that in preparation for defending or fending off criminal charges, incidental to your employment, you are still precluded then I agree with you, we have gone the wrong way...

J-1135-1 follows



(Mr. Spensieri)

~~be the next step, which is that in preparation for defending or
fending off criminal charges incident of the employment, you
still precluded, then I agree with you, we have really gone the
wrong way in it and we have gone too far.~~

I think with the parliamentary assistant being here and perhaps the minister in the future appearing as I would like to get some clear indication as to whether this is employment law or whether we are talking about something which unwittingly takes us far beyond the employment context.

Mr. Gillies: If I might respond, Mr. Chairman, I think that members of the committee will keep firmly in mind that this legislation is an amendment to the Employment Standards Act and the overriding clause is, if you will, the definition of the bill will take precedence over anything that we entertain in these amendments.

The intent of the legislation is clearly to eliminate the use of the polygraph test and other testing in the employment context. For this reason, there is a specific exemption in this particular bill which will allow the continued use of lie detector testing in the overall context of a police investigation. It is certainly the current intention of the ministry to maintain this exemption, such that when a case of the kind that the witness has alluded to did in fact become subject to a criminal investigation, the polygraph may, in fact, be part of that investigation.

The reason, Mr. Chairman, that I don't think that he could entertain the kind of amendment that is proposed here on section--excuse me just a moment--

Mr. Fallis: Just while you are looking that up, I would just indicate that the section that you are alluding to allows only the police to do it. The truth is the matter for the police, I would say, that is Orwellian, when it is just the police who may do it.

Mr. Gillies: Well, we see a number of problems.

First of all, in terms of your comments on section 39b, we would not see it sufficient to merely, as you indicate, eliminate the mandatory testing. It is the opinion of both the Attorney General (Mr. McMurtry) and the Ministry of Labour that where the refusal to take a test is tied so directly to the continued employment of the person, that that is not, in fact, free consent.

I would have to concur with Mr. Renwick that I think that certainly our interpretation of the Charter of Rights and Freedoms would be such that we have no hesitation in putting forward this legislation in terms of the charter because we feel that we are very basically enhancing the basic rights of the employee to not have to be subjected to this type of testing. Our intention would be to keep section 39b intact with the three subclauses.

(Mr. Gillies)

Briefly, sir, while I listened very carefully and I think that certainly you can use the interpretation that you are in fact looking for truth and that the intent of the testing is to detect truth rather than lies, that does not, in my opinion, address the question of accuracy. It may not be any more accurate in realizing truth as opposed to lies and indeed I think that this is probably one of the reasons that courts in Canada have not entertained polygraph test results as admissible evidence. I would therefore question that this is a very definitive method of detecting the truth when a matter is referred to court and it will not be entertained by any judge in the country.

Colonel McQuiston: Sir, I would like to point out that the opinions of the crown at this point were predicated or somewhat ignorant.

In regard to the statistics that you quoted and our friend said, "hidden behind the bikini", you were saying 90 percentile. That is not exactly correct.

What you are dealing with, as far as the last major accepted scientific study on p.s.e. was concerned, is that with a trained, experienced examiner--this was a double blind study, completely accepted in the field--the p.s.e. was given an accuracy rate of 96.25 per cent.

Now, there is a three per cent float in there that you cannot run. You cannot run the three per cent bottom of the intellectual society. Idiots, imbeciles and morons lack sufficient intellectual capacity to know right from wrong. So if you take the 96.25 and the three per cent, you are more in line with what an experienced examiner can do with this technique.

Mr. Gillies: If I may sir--and I would hope that you would correct me if I am wrong--our understanding at the ministry is that that particular testing, which did in fact arrive at over 95 per cent accuracy, was testing in which people were being questioned about a specific event. The machine was not being used as a screening device and to the best of our knowledge, there is no body of evidence...

J-1145 follows

(Mr. Gillies)

~~was testing in which people were being questioned about a specific event. The machine was not being used as a screening device and to the best of our knowledge there is no body of evidence available anywhere which has commented on the accuracy of the machine testing as a screening device.~~

I believe that it is this uncertainty, as much as anything, that has led over 20 of the states of the US now to take the type of steps that we are contemplating.

Colonel McQuiston: Which is exactly what I have been fighting because they have been dealing with a body of ignorance, too. I have been trying to fight that for most of my professional career since I retired from the army.

In most cases, those laws in the United States are unconstitutional, pure and simple. We have tried to fight this in the society. The reason stated for the establishment of these laws in the United States is slowly coming to surface now and we are getting Nebraska and North Carolina, Louisiana, California and the others are beginning to look at some of the more rational approaches to just exactly what this technique can do.

In regard to screening versus specific examinations with an accepted technique and a trained examiner, there is little, if any, difference because you have to understand the control procedures for administering these tests. The accuracy rate is, in essence, the same as it would be for a specific. You cannot say that because it is screening--which is a misnomer to begin with--that it is less accurate and less reliable than a conclusive, concrete, criminal type case. You cannot say that.

Mr. Fallis: One distant extension of what you said--you indicated that there is no body of evidence that says it is. I suggest to the parliamentary assistant that there is no body of law that says it is not. You are building shields for fantasies at the expense of the rights of honest people. Do not take those rights away, and that is what you are doing.

You may not have been out in the real world earning a living, paid by the government. But the real world tells you that there are people out there who are human beings. They have feelings and the thing is that they have rights, too. I cannot stress that enough. "Big Brother is Watching You" that sits in this building and passes laws--they come out by the reams every day. The thing is that if you cannot cite a specific example ??before you are here and if you haven't even bothered. You are the Parliamentary Assistant to the Minister of Labour. If you cannot bring a specific example for us to put on the table and examine, then we are dealing with fantasies.

I suggest then that--

Mr. Mitchell: With respect, Mr. Chairman, the sort of thing that you are talking about is, in my opinion, confidential in itself. There are a number of things catalogued there, of situations that have been brought to the Ministry of Labour, but I think to put on the table here the name and whatnot of all of these people--you have not used the name of the young lady, for example, in your situation.

Mr. Fallis: You have given us one bone out of the foot trying to describe a body. That is what you have offered in those examples. They are just nothing. You would be laughed out of court if you walked into court to try and eliminate the use of the evidence on that material. It does not exist. If you look at it, there is just not any weight to it.

Mr. Chairman: Thank you, Mr. Fallis.

Mr. Gillies: With respect, very briefly, Mr. Chairman, we as legislators bring forward measures that we think will enhance the rights and privileges of our people on the basis of the best available evidence. I see it as no argument, sir, that there is no countervailing evidence. I would suggest to you that if this is a failing, perhaps members of the industry might have wanted to respond to that in the face of government actions in over 20 of the states of the US and now in this province. So I see that as no argument.

Further, if I may, I take some exception to the suggestion that I or other members of the Legislature do not deal with the real world. We are not tilting at windmills, sir, when we sit in our constituency offices every week and are faced with dozens and dozens and dozens of people who can outline to us the problems that they encounter as working people, and indeed the problems that employers encounter. I would suggest to you that we have as good, if not a better grasp, on what is going on in the real world through out dealings with our constituents than many would.

Mr. Fallis;: I am sorry. You are an MPP then?

Mr. Gillies: Yes.

Mr. Fallis: Oh. I thought that you were one of the hidden numbers in the--I take it back, then.

Mr. Ruston: He did say one thing that was right though, but I will not repeat it.

Mr. Gillies: I might go into hiding at some point, but--

Mr. Fallis: I respect you to the utmost. I apologize. I take it back.

Mr. Chairman: I think that Mr. Mackenzie has a question.

~~Mr. Mackenzie: Just a couple of questions.~~

~~One observation, Mr. Fallis, is that...~~

J-1150 follows

Mr. Mackenzie: Just a couple of questions and one observation, Mr. Fallis.

I was struck by your spirited defence of an employee's right to have this justification to take the lie detector test. I do not know whether it counts. Maybe our opinions do not count at all to you in an issue like this. Let me tell you, I have never had an employee--and I have dealt with a lot of them--who has asked me to do something about assuring his or her right to take a lie detector test. I sure as hell have had them come to me objecting to it, and in large numbers. Maybe that does not count, but it has also been an issue in some of the labour cases we have had.

I suspect some of the examples you criticize here do not have a specific name to them. As a matter of fact, looking through them quickly, I suspect a number of them are ones I and my colleagues have raised with the ministry over the last three or four years. So certainly there is that side of the coin as well.

We do get people every single week, and twice a week in my constituency, with a variety of complaints. We are fairly close to what is going on out there in terms of people.

What I really wanted to ask you about was your argument or feeling that the right to refuse to take the test is somehow or other all we need to protect the employee? I do not know how much work you have done in the labor relations field, but I have found damn few people who have been fired by a company. If you are starting as an equal in a situation, fine. But the employee is not. He is either looking for a job or he has a job.

You may go to court, you may have some challenges under the Employment Standards Act. But in a discharge, I have rarely had a company admit that they just discharged the employee because he had done something that was protected, like the right to refuse to take that test. There are 1001 different arguments or reasons you can give for that discharge. It may very well be totally because of that refusal but how are we going to know. You did give a defence that there is this human nature side of it to look at. That is not good enough for me.

Mr. Fallis: I suggest to you there is and it is in the area of licensing, putting into place a regulation that will build that protection in. It is not impossible to draft. I am not a draftsman, but my association would gladly sit down with the government to assist in trying to overcome that problem.

How do you do that? Maybe you could set out a standardized set of questions that would be used only on employment for polygraph purposes if they are going to volunteer to take a test. Maybe the answers have to be filed with the government or whatever, but I think it is not beyond the competence of the Legislature and the draftsmen to draft the appropriate regulation to address this particular issue.

Right now, it is the wild west as far as that is concerned

because there is no law to prohibit it so you have an "anything goes" situation and in that scenario, anything goes. It is the wild west of lie detection. There have not been that many problems.

Mr. Mackenzie: I grant you we might improve it in future, but we had evidence before us this morning. The representative of the jewellers' association indicated they have certain high-risk employees whom they send for the test. He also had no idea of the competence of the tester. He did not know the questions that were asked or anything about it. So right off the bat, it raises very serious questions in my mind as to the just of what they are doing.

Mr. Fallis: We are trying to bring laws to the wild west of lie detection or truth detection. You have hit the nail on the head and you are addressing exactly the right issues. I respect your insight on it.

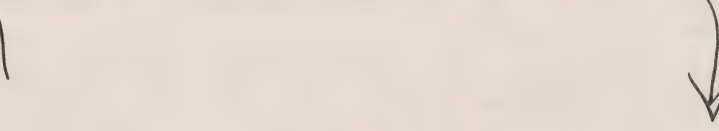
What do you do? Do you just ban it outright or can you work with the science that is there? I suggest progress is taking the science, looking at all the positive parts of it and then working it in a setting that will allow it to be properly used and administered by competent, trained people and setting up standards.

I suggest it can be done as it is in the United States. My understanding is that there the cost of setting up the examinations and all that is all borne by the people in the industry. It does not have to cost the province money to do that. That is a cost that could be borne by the industry in their own establishments.

You can certainly assist greatly in your observations by encouraging regulations to be put in place. We are all for regulation, as you will hear from the Canadian Association of Police Polygraphers as well. They are the same.

Mr. Mackenzie: You would certainly go against the trend..

J-1155 follows



~~observations by encouraging regulations to be put in place. We are all for regulation, as you will hear from the Canadian Association of Police Polygraphers as well. They agree the same.~~

Mr. Mackenzie: You would certainly go against the trend if you are because most professional groups that are before us are not that anxious for additional regulations.

Mr. Fallis: It is surprising. We welcome that. We just wanted to remove from the legislation the freedom of expression within the bill. That is all we want to do.

Mr. Mackenzie: Just one final point which several members have alluded to and that is the accuracy. I do not know all the tests but I do know I have not had anybody give me a better than 90 per cent accuracy rating on it yet. I have also had the additional arguments made to me--and I think there is at least one reference the government has made in their background papers as well--as to the invalidation of test results by using some fairly mild and accessible tranquilizers. That is another question that raises some doubts in my mind.

I am not sure it would just be the idiots or morons, the three per cent. I am sure in any test figures or percentages you give, there is a rate, just as there is in polling. Some people are going to react differently than others. Even if you only had a four or five per cent rate of not being accurate, I would have serious doubts about the testing.

I also wonder about all these other points that have been made, some of them by reasonably competent authorities.

Mr. Chairman: Thank you, Mr. Mackenzie and Mr. Fallis. Colonel McQuiston, we certainly enjoyed your comments. Thank you very much for appearing in front of the committee.

The next witness is Dr. Ben Silverberg, director of Applied Polygraph Sciences Inc. and vice-president of the Academy of Certified Polygraphists.

Dr. Silverberg: Thank you, Mr. Chairman, and members of the standing committee.

As a scientist, this is my first exposure to the legislative process and it is extremely frightening. It is frightening that the Minister of Labour and his ministry can purport certain facts about the profession of truth verification, that they can justify their reasons for the introduction of this bill, that they can bastardize the literature, be selective and biased in their selection of statistics and even play a very common statistical game, as alluded to earlier this morning.

I have a very frightening task in front of me. I have been allotted 40 minutes to clear up the misconceptions that members of this committee and members of the media have about truth verification and polygraphy.

(Dr. Silverberg)

To speed up the process, I am going to use the slide projector and very quickly go through a slide program for you. I have presented a number of reprints in the yellow folders as backup material.

Mr. Renwick: Before Dr. Silverberg proceeds, he might give us his qualifications.

Dr. Silverberg: A Ph.D., University of Toronto, 1974; post-doctorate fellow, National Research Council of Canada, for two years; I have held academic positions at the University of Guelph and the University of Toronto; polygraph training, certified in the United States, 1978.

Mr. Renwick: Before you go on to the polygraph training, what was that background? What was the field in which you had your educational background and training?

Dr. Silverberg: A Ph.D. from the University of Toronto in physiology.

Mr. Renwick: Are you a qualified physiologist?

Dr. Silverberg: In what sense? I have published over 60 research publications.

Mr. Renwick: You are not a medical doctor?

Dr. Silverberg: No. It is a Ph.D.

Mr. Renwick: What was the field of your thesis for your Ph.D.?

Dr. Silverberg: That goes back a while. Let me think.

Mr. Renwick: I think your qualifications are relevant to us. Perhaps rather than extemporize on them, you might put them on paper and send it to the clerk of the committee.

Dr. Silverberg: I certainly can. There is a brief overview of my qualifications in the brochure that is included in that package I submitted. The brochure is entitled Polygraph in Private Industry. On the third or fourth last page there is a brief overview of some of the affiliations I have held in the past and some of the professional groups I belong to. I am a distinguished fellow in the Academy of Certified Polygraphists and presently their vice-president. I am scientific editor for the Journal of Polygraph Science.

Mr. Renwick: I understand that and I do not want to press it. I want to know what your background of training and education is to have you come before us as a scientist to...

J-1200 follows



~~I want to know what your background of training, education and so on to have you come before us as a scientist to establish certain oppositions for us. I think that is extremely important.~~

Dr. Silverberg: I agree with you. As I say, my background is in physiology. The entire area of physiological detection of deception falls under the domain of psycho-physiology. In the slide presentation I will give you the scientific premise and theories that support the theory of truth verification.

Polygraph is a subdiscipline of psycho-physiology and I think my qualifications are such that I can speak before you with some confidence. I have published and taught in the field. I teach at the Canadian Police College. I was seconded to be a co-author of their advanced training standard at the polygraph training section of the Canadian Police College. As I say, I am scientific editor of the Journal of Polygraph Science.

Mr. Chairman: Before you proceed to the slide presentation, I might recommend to Mr. Renwick and Mr. Mackenzie, if they are interested, they might want to swing over to this side so they can see the charts.

Mr. Mitchell: Mr. Chairman, I think it would be of benefit not only to this committee, but to the people who are scheduled to appear this morning, because we are now in a situation like I was expecting. How long is your slide presentation?

Dr. Silverberg: As I say, I was notified that I had 40 minutes. I have tried to time it that way, but that does not--

Mr. Mitchell: That does not allow for questions.

Mr. Chairman, I might suggest to you that we are now at 12:02 p.m. and that it would hardly be fair to the next group of people who are scheduled to appear to come in because they would have perhaps no time. They may wait here and not get any time prior, and I might suggest that it might be the consideration of the committee that for the group that is scheduled to appear at 12:20, that we might attempt to reschedule them after lunch because of the time situation we are in.

Mr. Chairman: First of all, we cannot meet after lunch because we do not have permission from the House to sit ??.

Mr. Mitchell: Then it would have to be some time tomorrow. We do have a problem with time.

Mr. Renwick: We do not have it yet.

Mr. Mitchell: We will have.

Mr. Renwick: We have an hour.

Mr. Chairman: Why don't we just proceed, Mr. Mitchell? If we cannot fit them in, maybe we will have to make other arrangements.

Dr. Silverberg, please continue.

Dr. Silverberg: As far as qualifications go, I should add that I am a practising polygraphist, certified and practising here in the city of Toronto for the past five or six years. My practice has taken me coast to coast, as well as doing much testing in the United States.

Can I get some assistance in closing blinds?

Mr. Chairman: I think Mr. Arnott is on his way over there.


Dr. Silverberg: In this slide presentation I would like to deal with the myths, the commonly held myths about polygraph and at the same time address the reasons given to us by the ministry for the introduction of this bill. I think they go hand in hand as far as one explaining the other.

I have chosen this particular slide as an opening because I think it is very typical of how misconceptions about lie detectors originate and how they are propagated. Here is a typical column from Ann Landers: two spouses having some matrimonial problems, the old infidelity case and it is resolved through a polygraphist or a lie detection specialist. I think most people assume that is all we do in private practice. That is the only thing that lie detectors are good for, testing cheating spouses.

I think Ann Landers' response is worthy of comment. "A few years ago the New York Psychiatric Institute tested the validity of lie detector tests. Seven out of 10 subjects stayed with the lie and registered normal." What she is saying is lie detector tests do not work. She has cited this particular institute which I have never heard of and there is no literature search can uncover this particular publication.

As a scientist I query the fact that the sample size, the population size for the experiment--

J-1205 follows



~~...who cited this particular instance which I have never heard of~~
~~and no literature search can discover this particular publication~~
~~As a scientist I assure the fact that the sample size, the~~
population size for the experiment was only 10. One has to
question their psychiatric state, if it was done in a psychiatric
institute. Needless to say, we have two million readers now in this
country who go away thinking that lie detector tests do not work
because Ann Landers has told them so.

As I say, I am going to be looking at the reasons for the
introduction of legislation concerning the employment related use
of lie detectors. I think it is important that we appreciate the
history of polygraph. I know everyone gets bored with history
lessons, but it is important to see why polygraphs fell into
disfavour in the United States, why certain myths originated and
why they are still believed in today.

If we look at the whole area of truth verification, we can
see that man has been preoccupied with the whole scenario of truth
verification. We have tried all sorts of things running the gamut
from torture to the ritual of, something that we still practice
today in courts of law when we place our hand on the Bible and
affirm to tell the truth and nothing but the truth.

Torture, some people say that the cross-examination in a
court of law is the modern day ritual of torture. Science has also
been intimately involved in the quest for an adequate and valid
technique in truth verification. We run the gamut again from
hypnosis, truth serams and polygraph. It is my contention that it
is only polygraph--scientists will agree--that has achieved a high
degree of accuracy, both validity and reliability.

If we go back to the beginning of the century, we have a
number of professionals. Lie detectors were not invented in the
back room of some sleazy Chicago police station. There were
reputable scientists involved in the germination of the field of
polygraphy.

On the left of this photograph is Dr. Marston who was at the
time a well-known psychiatrist. He is administering a polygraph or
a Marston systolic blood pressure test as it was known at the turn
of the century to a murder suspect. Behind the instrument on the
table we have Dr. Larsen, who was a young medical student at the
time this photograph was taken and we have Edgar Hoover on the
right of FBI fame.

Mr. Mitchell: The big brother.

Dr. Silverberg: You will notice that the examinee has a
single attachment on his left arm. That is the blood pressure cup.
This is a schematic diagram of that very primitive instrument..

I want to make one comment here. The precursor of the
modern-day blood pressure cup was invented by Dr. Marston for the

specific purpose of truth verification. It was not invented by the medical profession for recording blood pressure. This is the primitive instrument that he used.

It was this instrument that he tried to introduce into a court decision in 1923--the famous Frye decision. He called the individual that he was testing truthful on the basis of this very, very simple and primitive test. For some reason the American media coined the term "lie detector" even though the examinee was called truthful. The judge excluded the evidence, rightly so. There was no body of scientific literature to support it. For the next 50 years polygraph was excluded from criminal courts in the United States but the term lie detector continued.

The only thing that kept polygraph alive for approximately 40 years was the commitment by the American law enforcement establishment. Most of the early scientists had given up in frustration looking at the physiological detection of deception because of the lack of physiological recording instrumentation. We did not have polygraphs at the turn of the century. However, police, private security kept working at it and working at it.

In this particular slide we have Mr. Pinkerton on the left of Pinkerton Security Agency administering a mock examination to the Chief of Police for San Diego, California. You will notice now that there is a new attachment, this one placed around the upper chest of the cheek. You can see that the police departments are beginning to do their own research. They are going out into the scientific community and looking for additional physiological parameters to measure.

This is Leonard Keller, one of the founders of modern day polygraphy, a psychologist who introduced further physiological parameters and, in fact, built the first polygraph for truth verification. Again, the media come in to taint...

J1210 follow



(Dr. Silverberg)

~~...founders of modern polygraphy, a psychologist who introduced further physiological parameters and built the first polygraph for truth verification. Again, the media came in to ruin the lie detector. He built it himself. It was in a wooden box and that's where the media obtained the expression, "the black box."~~

Evolution of the instrument. Everyone is quick to say, critics are quick to say the polygraph instrument hasn't changed, the lie detector hasn't changed in 40 years. It is still primitive. That is not so. The Ministry of Labour has made great dramatic statement saying that there is no such thing as a lie detector. It does not measure lies; it measures stress. What is so earthshattering about that? We have never purported nor has the industry that there was a machine that could detect lies. Of course, we are using physiological recorders. There is an evolution to the sophistication of them. They become more compact, more electronic circuitry, more sophisticated.

There is your typical examinee being tested on a polygraph with the various attachments. That is in a typical truth-verification situation. There is your typical field polygraph. That's a polygraph. You can find one in every second-year psychophysiological lab. There is a polygraph. If you want to spend \$135,000. You will find it in every hospital. It has computer capabilities. There is another one, the Rolls Royce, the ??Beckman. You will find polygraphs in the lab, in probably every doctor's office. If anyone of you have had an electrocardiogram, electroencephalogram, you have had your lie detector test.

We have always maintained that all we are using is sophisticated biomedical recording instrumentation. All we do measure is body functions. That is the science of psychophysiology. There is nothing earthshattering that there are no lie detector machines. They are quite sophisticated. I am not sure what the emphasis of the ministry was in citing that as one of the reasons for outlawing the use of the polygraph.

Of course it must be interpreted. The medical profession is an interpretation, a diagnosis and interpretation. Psychiatry, law, are those not fields of endeavour, professions where we have to interpret. Polygraph today--critics will say there is no science to it. It is an art form, if that. That is a big concession we can get from them. Yet my contention is that there is a vast body of funded knowledge and it is continually growing with the research being put into it, not only in the actual field of polygraph but all the ancillary field, psychophysiology, pharmacology, medicine, psychiatry, we extrapolate from those sciences. There are respected journals. I am not saying that just because I am a scientific editor of one of them. These are respected international journals where we get contributions from scientists and co-workers all around the world, Japanese, Israeli, India, Poland.

Accreditation of training standards: One of the early complaints--it was mentioned in the Morand Commission hearings. AT


(Dr. Silverberg)

that time--I will come back to pass my comments on the Morand commission report. One of the concerns was that there was no standardized curriculum to the training of the polygraphists. This was true in the 1950s, 1960s and maybe the early part of the 1970s, but the American Polygraph Association has been working extremely hard with many universities in the United States to set up professional training standards.

There are at present 36 accredited schools, accredited by the American Polygraph Association, and the minimum educational requirements to get into these schools is a Bachelor's degree with a major in physiology and/or psychology. There are some schools that cater to governmental agencies and police agencies and they've had to make some concessions there because they don't have the educational requirements. In lieu of that, there has been years' service and learning by the school of hard knocks. But private practitioners have to have a university degree. We've come a long way in ensuring the quality of the people trained as polygraphists.

Mr. MacQuarrie: Excuse me, you mentioned a minimum requirement--

(1215 follows)



~~Practitioners have to have a minimum university degree. We have come a long way in ensuring the quality of the people who are being trained as polygraphs.~~

1 Mr. MacQuarrie: Excuse me. You mentioned the minimum requirements before taking the course of a bachelors in physiology or psychology. How long then is the course?

Dr. Silverberg: The courses vary. Some courses are in conjunction with universities, other courses are by private agencies and the courses run anywhere from nine weeks. The Canadian Police College, for example, their course is three months. That is classroom work. Then there is a year's internship which has to be done under supervision where your field, you are being supervised and assessed on your actual field project.

Mr. MacQuarrie: Is the year's internship of universal application or is that peculiar to the Canadian Police College?

Dr. Silverberg: No, that is the United States. At the Canadian Police College, which only accepts police applicants, it is a three-month course and then I believe it is two weeks in the field under supervision. Then they go back to their police department and then they have to submit their first 60 cases for quality control. Then they are brought back a year later for an advanced training course. So there is continual updating. Polygraph is not a science that is staying still. There is a great deal to keep up with.

Is there funded knowledge? The University of Chicago, Chicago Circle is certainly willing to hand out an MSDD, a masters of science and detection or deception.

Mr. Renwick: Which university?

Dr. Silverberg: The University of Chicago at Chicago Circle, that is the campus, in conjunction with the Reid College.

Mr. MacQuarrie: ??also publish the Encyclopaedia Britannica.

Dr. Silverberg: Was that a question that was directed to me?

Mr. MacQuarrie: It was not an question, just an observation on the ?? of the university.

Dr. Silverberg: Let us look at polygraph usage among major US corporations. This was published in the journal called Personnel. In 1979 there was survey that was done by an unbiased group of business administrators who were testing the statements by the American Polygraph Association that over a fifth of the top US corporations were using polygraph and so that was what they went out to survey. They surveyed the top 1,000 corporations and this is the way it breaks down as far as the use of polygraph goes.

(Dr. Silverberg)


You can see that the major uses in the retail sector, as well as the financial institutions, the industrials and transportations, third and fourth. We can see that in fact one fifth--this is 1979--of the top 1,000 corporations are in fact using polygraph. When you take a look at regulated versus nonregulated, in other words, states that have laws that ensure quality control and ensure that the polygraphists are competent and spell out the principles of practice versus states that do not have any legislation, you see that where you can ensure quality control in the likes of the people who are being asked to take the tests as well as the people who are administering the tests, you see that there is a dramatic increase in the usage in states that are licensing their polygraphists. Again the financial institutions lead the way.

I will come back to talk--we have heard all sorts of statistics. The term 20 states has been bantered around as having anti-polygraph legislation and I will correct that for the committee's benefit in a little while.

The field of polygraph as a security tool for security investigations, regardless of what the field is, hotel and motel, computer security, airport security, every one of these textbooks, a special textbook in each of these special areas refers to the polygraph as a viable tool provided the person doing the testing is competent.

The Canadian Police College, I have already gone over the course that they have. Again it is interesting to note how the media, the media always treat lie detectors as instant copy. Here is a classic case. I heard a few of the members musing with the term "lie detector" versus "truth verifier." Here is a classic case of misnomers. Look at the title, "Lie test failures usually confess." This deals with 1,303 polygraph examinations administered by the RCMP in one year. Look what the Globe & Mail picks out as the important key there. The important key is not that. The important key is that of the 1,303 polygraph tests, some 703 or approximately 80 per cent of those people were confirmed truthful people. ~~In other words, the polygraph has called them truthful and then later on through the judicial process that opinion was verified by judicially~~

J-1220 follows



Dr. Silverberg:

~~approximately 80 per cent of those people were confirmed truthful people.~~ In other words, the polygraph has called them truthful and later on, through the judicial process, that opinion was verified by judicially recognized evidence. That is the important thing there, that it is being used as a truth verifier.

Mr. Renwick: And the reverse, what is the reverse of that?

Dr. Silverberg: You would have to see with the pen and paper. Twenty per cent did not fail their exam because they have a 30 per cent inconclusive zone in those stats, and that is not something to the detriment of polygraph. That inconclusive zone--and I will come back to talk about numerical scoring and objectivity and all of that--is a cushion so you do not end up, if you are competent and qualified, calling a truthful person guilty of a crime and calling a guilty person to get off on a crime. There is a zone, a numerical zone, where, if that is the total score of the examination, a polygraphist has to say: 'I am inconclusive. Given this set of facts, these questions, the examinee's state of mind today, we cannot make an opinion.'

Mr. Renwick: What is the other part of that equation? You say that there is--

Dr. Silverberg: There is an inconclusive zone and then there is--

Mr. Renwick: There are truthful people, there is a shady area, what is the other?

Dr. Silverberg: Ten to 15 per cent of the people who take polygraph examinations are, in fact, deceptive, and confirmed deceptive. Again, the deceptive opinions are confirmed, either by confessions here or they go into the judicial system and, with other evidence, it is shown that the polygraphist's opinion was, in fact, correct. These are confirmed opinions.

However, I want to point out that these same things at 80 per cent, year after year 80 per cent of the RCMP administered tests are, in fact, confirmed truthful. If you obtain municipal statistics, it is the same thing. When you go into private practice, and I can provide you with my results if you wish--

Mr. Renwick: Have you got any of those statistics?

Dr. Silverberg: I can certainly have them here and documented.

Mr. Renwick: I do not want you to prepare them. Are there statistics?

Dr. Silverberg: Yes. Hopefully, you are going to have a presentation by the Association of Police Polygraphists. They will provide you with the statistics from across the country, both RCMP

Dr. Silverberg

and municipal. Having taught police officers and working very closely with them, I know what their annual statistics are, generally. They are not out there to catch guilty people, they are out there to verify the truthfulness.

The Attorney General, in response to my query when I said: "How can the Minister of Labour stand up and say that lie detectors are scientifically unreliable, invalid, they are an invasion of property, but we will allow the police to use them? That equation does not make sense", came back to me and said, "The police use other evidence as well."

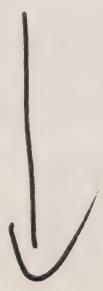
So do employers. It is the same in private industry. Regardless of that, knowing how police do use polygraph, and I am sure that will come out in future submissions, you will see that they are very, very selective. Municipal police polygraphists do not more than 200 to 300 examinations a year. The reason those examinations are being referred from the investigating officers to the polygraph branch is because there is nothing else. That is why they have been referred to the polygraph branch.

The Halton police polygraphists, we have tried to generate some very positive press over the summer. This is an example of some positive press instead of the denigrating of lie detectors and the profession and the employers who use so-called subversive tactics.

The Royal Ottawa Hospital, much like our own Clarke Institute, has had a polygraph branch for almost a decade, where they use lie detectors as part of the therapeutic process. How else is a psychiatrist going to know what type of amnesia his patient has and how can he then go ahead and prescribe treatment if he is not certain whether his amnesia victim has spotty amnesia, patchy amnesia or complete amnesia? The Royal Ottawa Hospital uses the polygraph in that very way and they have published a number of papers of how polygraph goes hand in hand with forensic psychiatry.

The medical profession is willing to include lie detectors in their displays. Why not? It is a diagnostic tool. What is the science? The science is psycho-physiology. Of course, there are many myths of how it works and I think this cartoon hits it right on the head.

Tape J-1225 follows



Dr. Silverberg

~~and I think this cartoon hits it right on the head.~~

→ That is not how it works. We are dealing with psycho-physiology, human behaviour and physiological response. I do not have the time to give you a third year lecture on it. I can hope for a primer, if you will. We are dealing with SOB, it is as simple as that--stimulus object behaviour.

We are dealing with two organ systems, if you will, the human brain--and I am not responsible for this dissection, by the way, it is not somebody who failed the lie detector test--and the spinal cord; that is the anatomy. The brain serves a very important function to control your internal processes as well as adapt you to the environment in which you live.

There is a sudden stimulus. How many heart rates went up, how many blinkings of the eye, how many pupils of the eye dilated?

Mr. Renwick: What has that got to do with it?

Dr. Silverberg: I am going to show you.

Mr. Renwick: Then why do you not get on with it?

Dr. Silverberg: I think your sentiments are the frightening aspects of this, sir.

Mr. Renwick: I hope that is right.

Dr. Silverberg: It is frightening that the politicians--

Mr. Renwick: If you would get on with the question of the application to the truth telling capacity of individuals from this pseudo-scientific display that we have.

Mr. Mitchell: With respect, Mr. Chairman, we have allowed other people to make their presentations.

Dr. Silverberg: My wife warned me this morning, "Please do not lose your temper." I am going to take her advice, but I am not going to allow you to make innuendos and criticize--

Mr. Renwick: This is pseudo-scientific nonsense that you are showing us.

Dr. Silverberg: No, it is not.

Mr. Renwick: It is not a consistent, developed, scientific assessment of what we are trying to find out.

Mr. Chairman: Could we please carry on? Thank you.

Dr. Silverberg: We are dealing with this particular nervous system called the autonomic nervous system. As you can see, when the brain perceives a stimulus, certain target organs

Dr. Silverberg

are either accelerated or decelerated on the basis of that stimulus. Dozens of times every single day this nervous system is energized, it is aroused, to protect the individual from stimuli, whether it be the loud sound of a hand clapping that was unexpected, changes in temperature or an intimidating stressful situation.

It has nothing to do with lying per se; it has to do with the stress associated with that interview and that causes arousability. The psychological theories as to why someone kicks in an automatic reaction are varied and well accepted by the field of psychology. They are varied in that we are dealing with human beings, so therefore there is no one theory that applies. It could be a guilt response. It could be a conflict. We are all brought up to accept good and bad and, if we do something wrong, there is a conflict there. It is the consequence theory.

Mr. Spensieri: Or just plain waking up.

Dr. Silverberg: Or plain waking up, yes. There are theories there. The psycho-physiological foundations on which modern day polygraphy exists are well accepted by the sciences. It is a shame that the Ministry of Labour and the politicians of this Legislature have not taken the time to thoroughly research this. It is evident in the statistical games that they wish us to believe in relation to the accuracy of lie detector tests.


You are talking about reliability and validity, how sensitive it is. That is the key issue, that is what they keep coming back on. Let us look at it in an objective, completely global perspective.

You have in that package a compendium of the validity studies that have been done. I invited the minister or his research staff to attend my suite where I house the full library of the Academy of Certified Polygraphists. It is the best library in this country; it is complete.

How can this ministry say to us that they have studied this before instituting this kind of bill when, first, they have not come out to the practitioners, they have not talked to the people taking the test, they have not come out and talked to the employers who are using this test? When we offer them the vast resources of a complete library, there are no takers.

These are their concerns. ~~Let us look at the literature and let us see where the ministry is getting its results. The key here is 1977 and I cannot~~

Tape J-1230 follows



Dr. Silverberg

~~these are their concerns~~ Let us look at the literature and where the ministry is getting its results. The key year is 1977. I cannot emphasize that strongly enough. It is the watershed year for polygraph research. It is unfortunate that the Morand Commission, that the one Supreme Court decision of Canada in relation to polygraph admissibility were all exercised prior to 1977. They were looking at a body of literature that were a decade old.

These are the valid field research--in other words, actually going out where we have validated cases. Not working in the laboratory with second-year college students, where there is no real life situations. These are actual field cases pre-1977. We have an average accuracy of 91 per cent. It is this study and the subsequent papers that came out of it, the United States Department of Justice' *pièce de résistance*, if you will. They were tired of all the criticism levied against polygraph. They wanted once and for all to: Address the inherent problems of verifying the accuracy of polygraph in the lab; develop methodology and look at chart interpretation, numerical scoring and what have you--the whole ball of wax. They sent out many hundreds of thousands of dollars to research this. It is unfortunate that it was not until 1977 that we begin to see this literature coming out into the academic world.

Group researchers here from the University of Utah, department of psychology, Dr. Raskin Podlesny and Barland. They are the ones who start with this 90 per cent business. That does not mean that you have a 10 per cent error rate.

Reliability pre-1977--there are two different words here. Validity is does it measure what you say it measures and reliability is an important key factor in any scientific experiment. Given the same methodology, will the same results be obtained somewhere else in the world. As you can see, that is not acceptable. Eighty-four per cent agreement is not acceptable. It was not acceptable to the polygraph profession. That is why we immediately went out, starting looking at the curriculums, started upgrading the qualifications to make sure we had standard quality control. That is the key word, again, pre-1977.

Now, let us see what has happened since then. We have validity. Do not be misled by the ministry and their assertions that none of these statistics have to do with screens. You have a compendium and it specifically points out that we have looked at the validity of screening examinations. In other words, the kind of question formats that are used specifically for pre-employment screenings. We have an average of 96.7 per cent. Is that not more accurate than the subjective appraisal of the personnel interviewer or psychological testing. How much more accurate does polygraph testing have to be? We are dealing with human beings. It will never achieve 100 per cent accuracy.

Mr. Renwick: What do you mean when you say it is 90--

Dr. Silverberg: When it is 93.6 per cent.

Mr. Renwick: What is accuracy?

Dr. Silverberg: In that particular examination, his opinion was verified. If he called the examinee truthful--


Mr. Renwick: What is the verification process of that?

Dr. Silverberg: If you are dealing with laboratory cases, they are called double-blind experiments. In other words, any of the people who are setting up the experiment know the actual ground truth: Who, in fact, has stolen something; who, in fact, will be telling the truth; who, in fact, will be attempting deception. The polygraphists were doing the testing of the subject--this is laboratory cases now--have no idea as to truth or deception, guilt or innocence in the mock scenarios. All they are have are the case facts and the questions to be asked.

The polygraphist examines subject number one and records his observations and opinion. It is either agreed upon or not agreed upon when his results are looked at in relation to what the ground truth is. The people who have set up the experiment know that subject number A was telling the truth. He was not instructed to lie. Let us see what the panel of six polygraphists have said. That is how we come up with the accuracy rates.

We know what the ground truth is here. ~~We have invented psychological techniques to mimic, in a laboratory situation, real life testing situations.~~

J1235 follows



Dr. Silverberg

~~on when what the ground truth is here~~ We have invented psychological techniques to mimic in a laboratory situation real life testing situations. For example, we induce electric shock in a lab testing situation. That motivates the individual to respond in a life-like way.

Mr. Spensieri: How can that ever be duplicated in real life?

Dr. Silverberg: It can. That is why I have separated the validity studies into what is called laboratory cases. I am showing you now do not let anyone quote you studies that were done prior to 1977 in the lab because they are not valid. It is like taking in a second-year college student, you say here: "This is part of your course. I will pay you \$5 and you will get a B standing is you are a willing participant in this particular study." There is no motivation there.

Those were the kinds of inherent problems we have had in looking at the validity of lie detection in a lab situation prior to 1977. We have overcome that but we agree. There is no scientist who will say that even using new techniques in the lab--but what I have done is I have separated them. I just want to show you now in the lab we have 93.6 per cent accuracy. That is with at least 1,000 examinees. We are not like Ann Landers dealing with some study, if it existed, with 10 people.

Criminal cases--that is where the opinion of the polygraphist was verified either with a confession, if he called the person deceptive or the judicial system upheld the polygraphist's opinion or if he called the person innocent, the guilty party eventually was caught. So these are closed cases, they are not open-ended--again, 96.3 per cent.

What we are pointing out now is that there is very little different--it was the comment that the colonel made--in the accuracy rate in relation to the various kinds of tests. If the ministry is going to accuse us of using antiquated techniques that have no scientific literature, I have to guffaw. They have not done their homework. They have not come out to ask us to show them our question sheets, our techniques. What questioning format are we using? These are valid, acceptable techniques that have a literature to support these high accuracy rates.

Counter-techniques--every practising polygraphist has had some deceptive examinee come in and attempt any one of these. There is no drug on the market today that is going to take a truthful person and reverse his reaction so he comes out deceptive or vice-versa, a guilty person trying to covertly suppress the ethicacy of the technique, and hopes he is going to come out truthful.

If it does happen--and I am not naive--look at the qualifications of the examinee; but do not cite me a lab study with second-year colleague students taking valium in a mock

Dr. Silverberg

scenario. In real life and in confirmed cases it does not happen. Even when you go to the sophisticated attempt of using hypnosis to actually block out periods of time in your mind.

There are at least half a dozen papers in the journal of experimental and clinical hypnosis that deal specifically with polygraph and hypnosis. Repeatedly the conclusion is that hypnosis is not an effective countermeasure. Dr. David Lykken, who I am sure the ministry will cite as their academically-laden critic of the lie detection technique, himself, has two publications. One publication shows the validity of a testing technique to be 100 per cent. In another study he takes trained psychiatrists, medical students and interns, trains them with all his knowledge to effectively counteract the efficacy of the technique and then places them in an examination scenario and not one of these people who Dr. Lykken trained himself were able to beat the polygraph.

When I first contacted the ministry and asked for the reasons why the Ministry of Labour is introducing this law the use of polygraph, I was cited scientifically invalid as one reason and that Justice Morand, in his commission hearings, directed the government to outlaw the use of polygraph. That is not the case. Recommendation 28, the very last recommendation that Justice Morand has in his commission hearings is that. I think the key word is study. ~~He did not instruct them to outlaw it. He asked them to study...~~

J1240 follows



Dr Silverberg

~~recommendation that Justice Morand has in his Commission
hearings as that. I think the key word is study.~~

→ He did not instruct them to outlaw, he asked them to study it. I ask you as rational, intelligent men and women, how can you study something if you do not come out to the people in the province that are practitioners of that science? That if you do not go out to the employers of this province and ask them, how are you using the polygraph? Or go into these companies which are using polygraph and talk to all the employees?

I have heard counter-statements here that we get at least two complaints a week, or something like that. We have witnesses here that are taking polygraphs--employees--sure we can be accused of hand-picking them, but we invited the ministry to come out and talk to our clients--walk freely through the plant, talk to anyone you choose. The invitation was never accepted.

How can you study something if you do not do those three basic steps?

We are dealing with Ontario. I have talked about America and all of their laws. This is Ontario. We are here. We've been practicing polygraphs ?? for 11 or 12 years. Why all of a sudden is there an avalanche of criticism and complaints? I will come back to voice some concern about these so-called complaints.

Before the Liberal Caucus I asked them, why are you against this, and they said it is not accepted in court. That is an injustice. The reasons for not being accepted in court I have already alluded to--decisions were made pre-1977, and if you look at Madam van Camp's written decision, she does not say that polygraph is unreliable--that Mr. Reid?? was unqualified to do the examination. She excluded it because it was hearsay evidence. We are dealing with something else.

Mr. McMurtry wants us to believe that that is why it is not allowed in a court because it is scientifically invalid. You people have access to the legal literature--read the transcript.

That is a very complicated slide that I have never ever been able to put into focus because it is so complex, but it outlines exactly what the legal status of polygraph is in the United States in criminal cases.

When Justice Morand listened to his evidence there were not more than half a dozen courts in the United States that would listen to polygraph evidence.

Mr. Renwick: Interpret the first line for us.

Dr. Silverberg: The top goes--whether it has ever had polygraph evidence introduced; whether it has allowed it in under agreement stipulation; whether it is over objection; whether it is criminal or civil; whether the state has a licensing law; whether

..there is no law; or whether it has ever considered such a law.

Mr. Renwick: And what is..

Dr. Silverberg: I will give you a brief overview. The overview of the legal--as far as criminal cases go in acceptability of evidence today in 1983 in the United States as of approximately March, there were 36 states of the union that allowed polygraph evidence in a court testimony; 14 over objection; the rest through what is called an agreement stipulation.

That agreement stipulation is not something that reflects ill upon the profession of polygraph, that is so that everyone's rights are protected.

There are 14 states that do not allow polygraph evidence in, and there are two that have never considered it.

When I hear talk about the criminal aspects of polygraph evidence--but the American judiciary has woken up to this very fact--before they would not allow it in, because it was not 100 per cent accurate--they demanded more lie detectors than anything else--psychiatric evidence, ballistics, blood-matching, whatever--but now they agree. Lie detectors can lie. I love it. The media invented that. That's true. It is not 100 per cent accurate. But so can other evidence.

Once you get over that threshold that there is nothing that is 100 per cent accurate, you can live with the high degree of accuracy.

Let us look at this employment area. This is 1978. This is two years after the Morand commission, and what you have are; 23 states plus a number of federal agencies that have a licence that is required; you have 16 states that limit its use, either partially or completely; and you have 14 that have no legislation whatsoever.

~~I want you to note though that 12 of the 16 states that have a regulatory law, passed those laws prior to 1970 that is when we had no scientific literature on the validity of~~

J-1245 follows



Dr. Silverberg

... I want you to note though, 12 of the 16 states that have a regulatory law passed those laws prior to 1970. That is when we had no scientific literature on the validity and reliability. We were in the dark ages in the 1960s.

Twelve out of 16 states passed those laws prior to 1970. Let's jump up now.

Mr. Chairman: Excuse me, Dr. Silverberg. Are you coming to the end of your presentation? I would like to allow the members some time for questioning because they are very enthusiastic.

Dr. Silverberg: I will speed up.

This is the point, 1983. I want to show you where the trend is going. We have 27 states now that are licensing their polygraphs. Many of these states had outlawed it, banned it, or limited it somehow and are now beginning to switch over.

We mentioned California as one that recently came over. The trend is towards acceptance of polygraph whether its in a judicial system or its in the employment context as a respectable science, that has a place, provided the people are competent and professional.

At the present time, before the Justice Committee in the House of Representatives, there is a federal bill that they are considering--that is the top copy I included in the packages that you have got--that will supercede state laws.

Mr. Renwick: Who has introduced it?

Dr. Silverberg: The American Polygraph Association through their particular lobbyists.

How is it being used? I think this is what I would like to stress, and I will forget the rest of the slides, if you bear with me, because I think there is some gross misconceptions here among the members as to how it is being used, and I do not think in this kind of format--regardless of how many people we bring forth as witnesses--are we going to get this across.

Certainly, the ministry did not go out to investigate this. They decided to read and to theorize as to how it is being practiced in this province.

Pre-employment screening is verification of employment application--nothing more.

The ministry has not accused any one of us as breaking any of the laws related to the questions that a prospective employer can ask. We do not ask arrest record. We do not even ask, "Do you have a criminal record." You cannot. You have to ask, "Do you have a criminal record for which no pardons have been granted?"

..There is no evidence that we have been breaking the law. As part of the selection process--that is the key here. I know of no employer--certainly no client of mine--is using the polygraph or the polygraph report as the sole basis for hiring or firing.

You paint picture of us as being very, very naive. We have learnt from the American experience. We know the problems that polygraph got into in the 1960s.

When we have prospective clients that want to set up polygraph programs, we tell them there are no laws at the present time, but I would suggest that you do not use polygraph as the sole criteria for firing on the basis of a deceptive opinion. If you can narrow it down and then follow it up with an internal investigation; if in a pre-employment context something comes out then go ahead and do a background.

Everyone of my clients--again, I have invited the ministry out--gives the job applicant a choice. He informs him at the time of filling out the application what is polygraph, how does it work, who is the man, and what are his qualifications, and these are the questions you are going to be asked. Otherwise, you cannot expect the job applicants to make an intelligent decision. They will tick off; I want the polygraph test; I accept it; or, I want a conventional background check.

I can take the ministry or members of this sub-committee to anyone of my clients and you will find people who have taken the polygraph that have been hired, and people that have not taken the pre-employment polygraph exam that have been hired.

I can take you to accounts that use polygraph on a regular basis as an in-house security tool; I can show you employees that are part of that program, and other employees who are not part of that program, and are still working within the same areas--we are not separating ?? people from caretaking staff.

Mr. Spensieri: Would those be executives or production people?

Dr. Silverberg: I have clients who go from federal agencies right down to mother and father variety stores. I have tested vice-presidents for financial institutions, and caretakers in a manufacturing plant.

Why use it? Is it a justifiable technique, that is the question? Let's not be naive, people do lie on their applications and an employer has a right to know whether that application is valid.

The avenues for that verification process have been cut off one by one, until he is left with what? Phoning two previous employers who he has never met and asking them a--

~~Mr. Renwick: That is not correct. There is a statute on the books there to which.. The responsibility of credit reporting agencies with respect to information related to employment and...~~

J-1250 follows

Mr. Renwick: That is not correct. There is a statute on the books there to which--

Dr. Silverberg: All right, I will not argue. I am just saying that--

Mr. Renwick: --the responsibility of credit reporting agencies with respect to information related to employment and a prospective employer or an existing employer can do or not, to verify the information.

Dr. Silverberg: There must be some reason why a fifth of the top 1,000 corporations in the United States and all of my clients and the clients of the other professional polygraphists in this province have chosen to go polygraph. They are not the devils that you paint them. They have spent the time looking at polygraph. Why would a company want to use something so emotionally provoking, so ill-painted by the press, if it does not work and it is not reliable and it is not scientific? Why would they go to all that trouble?

Obviously, it is going to cause bad company morale, they are not going to get the good applicants they want. Why are they using these subversive tools then? The answer is that they have researched them in an unbiased and objective way, they have sought out professional polygraphists and scrutinized their qualifications and scrutinized their programs.

Here is a letter from the chief of police of Calgary. He has been using the polygraph since 1974, I believe, as part of the screening process and he has just cited me the 1979 statistics on the use of polygraph as one of the many--and I mean many, they use psychological testing, medical background, Canadian Police Information Centre checks. After all of that, after the applicant has passed all of these stages, the very last step is the polygraph before they go in for a stress interview with senior police personnel. In 1979 he cites 21 or 23 per cent of the applicants who had passed all these other steps gave damaging, derogatory information during their pre-employment exam.

I am going to have to cut it short, I realize that. I knew that I could not do it in 40 minutes; I attempted.

Mr. Chairman: Well, we tried.

Dr. Silverberg: Yes, we did.

Mr. Chairman: I think we got through most of it, Dr. Silverberg. We would like to ask you a few questions and Mr. Renwick is first on the list.

Mr. Renwick: I have one question. You showed us the picture of the individual with the straps, and so on, on, and you analogized it with an electro-encephalogram test. What conceivable reason would there be for an individual in our society having to agree to that intrusion of that kind of equipment on to his physical person for the purpose of measuring his emotional or

Mr. Renwick

other types of reaction to stress. That is my problem: Why, to buy the job, do I have to go through that kind of a test? Why does anybody have any right to use this kind of instrumentation on me as a condition of me getting employment?

Dr. Silverberg: One very serious misconception here, and the Minister of Labour himself has been cited many times as saying it is an unwarranted invasion of privacy, that is something the critics do--

Mr. Renwick: I just asked you a simple question.

Dr. Silverberg: I will give you a complete answer. The problem with that is you are transferring thoughts and feelings for the people who have actually been asked to take a test. When you look at the surveys of attitudes that we have given you in that package, two that I have published and I guess I could be criticized for being biased, one by an unbiased source, where we go out and we actually survey the attitudes of job applicants and employees after they have taken their tests, you can see that they did not have the thoughts that you imagine they did.


Mr. Renwick: I am not asking anybody what their thoughts are at all. In a society that values the individual, what conceivable reason would there be that a person would have to subject himself to that particular kind of test?

Dr. Silverberg: I have had many reasons. I have met thousands of job applicants, I guess, over the last five or six years. I have never had a flare-up in my office. I have had many reasons as to why they came, some say out of curiosity as to what it was all about--

Mr. Renwick: That is great, if I want to walk in and ask for a test out of curiosity, that is one thing; but what you are trying to say is that an application of whatever the scientific background of the stress testing machines that you have, one application is to be that a person making an application for employment may be required to take this kind of a test.

Dr. Silverberg: Maybe.

Tape J-1255 follows



~~(Mr. Renwick)~~

~~may be required to take this kind of a test.~~

~~Dr. Silverberg: May be~~

→ Mr. Renwick: Why should anyone have to go, sit down, be strapped into whatever the paraphernalia is that goes with it, have the attachments put on and then have a machine test his physical, emotional, muscular and other reactions in order to get a job. Whether he accepts it as part of the game and goes along with it is not the question I am asking.

Dr. Silverberg: What is it that you are asking? You are saying if it is a condition of employment, then he is being forced to take the examination. We are not dealing with that issue, we are dealing with people who have taken the option; why they, themselves have taken the option?

Mr. Renwick: I am not interested in why an individual takes it. I am saying: What conceivable reason, as legislators, would we have to tolerate in the society any apparatus that tests the physical, emotional or other attributes of a person as a condition of that person obtaining employment?

Dr. Silverberg: If it were scientifically unreliable, if it hurt or damaged the physical or psychological process of that individual, I would say outlaw it; but we have 27 states that can live with it. It is being administered to the tune of 3.5 to 4.5 million examinations a year in the United States.

Respectable financial institutions, members of private industry do not find it abhorrent to ask their job applicants to take a polygraph exam as part of the pre-employment screening process. It allows the applicant, one, to have some direction over his screening, as opposed to all of it being done behind his back where he does not know what his previous employers are saying about him, he does not know what the credit reporting agent has said about him, he does not know what the computers will pick out as far as criminal records have to say about him.

An employer says: "Look, we can do a conventional background check of you, dear applicant, or you can get involved in your own background screening. Here are all the assurances that we give you: Your rights are being protected, you know what the questions are beforehand, you know the qualifications of the man who will be doing the testing, he will explain polygraph to you. We are not here to harass you, we are simply here to screen you effectively and efficiently. The choice is up to you."

If you look at the attitudes of those job applicants, they unanimously, or nearly unanimously, say: "I was not offended or embarrassed, I was not humiliated or degraded. Yes, I would take a test like this again." That is the important question there. If they would take it again as part of the hiring process, then what dastardly thing has occurred during that examination?

Mr. Eves: It is not every day I agree with Mr. Renwick, but I still do not think, with all due respect, you have really addressed his question. His question, if I read him correctly, is quite abase: Do you not regard a polygraph test to be an invasion of an individual's privacy?

Dr. Silverberg: I do not.

Mr. Eves: We are not interested in the attitudes of people who have taken it; that has been your great exposition over the last five minutes.

Dr. Silverberg: Excuse me. Your bill is intended to protect all of those workers out there in Ontario who have been in the past or will be--

Mr. Eves: No, not have been at all.

Dr. Silverberg: Well, will be. If we are going on past experience, the majority of Ontario workers who have taken polygraph examinations are unanimous that they did not think it was an offence, that they did not consider it an invasion of privacy. They did not; those are the ones you are going to be protecting down the road. What are you protecting?

Mr. Spensieri: Exactly correct; what choice did they have?

Mr. Eves: You have to admit--

Dr. Silverberg: No, I do not have to admit, because that is a hollow argument.

Mr. Eves: You did not let me finish my statement. Do you not think that, practically speaking, if employers are able to extract a polygraph test from a prospective employee, it is only a matter of time--and your statistics have just shown that--before the vast majority of employers in any one field or area are going to be using polygraph test, and it is basically going to come down to the fact that you will not be able to get a job in society unless you submit yourself to a polygraph test.

If you do not regard that as an invasion of privacy, then you and I are on a totally different wave length.

Dr. Silverberg: Again, we are talking theoretical suppositions.

~~Mr. Eves: Oh, are we?~~

~~Dr. Silverberg: We are.~~

~~Mr. Eves: Your statistics~~

~~Mr. Gillies: Mr. Chairman, we have had complaints at the Ministry of Labour and we have had employers contact the ministry to ask if they can, in fact, discharge employees for refusing to take the test~~

Tape J-1300 follows

Mr. Eves: Oh, are we?

Mr. Gillies: We are.

Mr. Eves: Your statistics--

Mr. Gillies: Mr. Chairman, we have had complaints of the Ministry of Labour and we have had employers contact the ministry to ask if they can, in fact, discharge employees for refusing to take the test. It is very clear to us that to merely say that the test should not be mandatory is not sufficient. That where an employee or perspective employee is being subjected against this yardstick, that it is not in any way free consent.

Mr. MacQuarrie: The thing that troubles me is not an application form for employment depending on some of the questions. Is that not, to an extent, an invasion of privacy? What about personality tests that are given by employers, aptitude tests and all that, is that not an invasion of privacy? We can stretch this invasion of privacy to any of a number of degrees and in the meantime we are handcuffing employers from finding out some pertinent information from employees who are going to occupy key positions.

Dr. Silverberg: Can I comment on what the parliamentary assistant has said? I was going to get to that list of so-called concerns. Many of those people who have contacted the ministry or my clients--because we have a standing policy, a principle of practice, if you will, that I have extracted from American experience that when you run into a situation where there is some concern, when you need unbiased objective interpretation of existing or non-existing laws, you direct those people immediately to the Ontario Human Rights Commission or the ministry itself.

In those very contacts, I have one client who has been listed--a restaurateur. He says to every job applicant, "If you have any concerns about this call the Human Rights Commission."

Mr. Renwick: Excuse me, Dr. Silverberg--

Mr. Eves: Who drafts polygraph tests? Does the prospective employer draft the test, does the polygraph analyst draft the test? Who determines what questions are asked?

Dr. Silverberg: Are you talking about the pre-employment examinations?

Mr. Eves: Yes.

Dr. Silverberg: Pre-employment examination is usually done by the polygraphist. It is his responsibility to keep up with both provincial and federal laws relating to the questions the prospective employer can ask.

In my particular practice, those are questions are looked at by my legal counsel to make that I am not breaking any laws so I can then go back to my clients and say: "At this point in time, these questions are illegal and may change down the road."

Mr. Eves: Does a prospective applicant have knowledge of what those questions are going to be?

Dr. Silverberg: At the place of employment, most of my testing the job applicants is done in my office. They are interviewed first and go through preliminary screening at the client's place of employment. There they are given a brochure and a bunch of literature to read on polygraph. Part of that consent form would include the actual questions and all the questions that would be asked of them in the actual polygraph testing situation. I am not the only polygraphist in the province that follows that principle of practice.

Mr. Eves: I see that one of the concerns of the Ministry of Labour outlined on their sheet are types of personal questions and pre-employment tests, drug use, family, friends, etc. How prevalent, from your experience, are those?

Dr. Silverberg: I am not sure what they mean about family and friends. How are you, how is your wife--that kind of thing. In the polygraph examinations the questions are usually restricted to six to eight, maybe sometimes 10 questions, as I say, that relate directly to the application. We do not talk about friends, family, religion, race, ethnic, political, sexual orientation or what have you. The back of that brochure that you have in front of you lists our principles of practice and our code of ethics.


You will see that even before the Charter of Rights came out, we were well ahead of the concerns of the people who we are testing. We do not invade anybody's privacy by asking legal questions. If a client wants us to do that, we simply drop them. Our clients are respectable members of the private sector. They are simply using a scientifically valid tool in a very professional and ethical way, otherwise they would not be using it.

Mr. Eves: I have a point that I would like to address to the parliamentary assistant. It was a point that raised by Mr. Spensieri. I am still concerned about it as well.

Sub-clause 39(b)(2)--and I appreciate that this is part of the Employment Standards Act--but literally at it definitely states that: "No person shall require, request, enable or influence directly or indirectly an employee to take or submit to a lie detector test."

I am still concerned about the hypothetical situation that Mr. Spensieri raised about whether or not an employee can voluntarily initiate a polygraph test and submit that test if he or she so desires to his or her employer or prospective employer. ~~I do not think that that question was directly answered...~~

P1305 follows



Mr. Eves

~~...to his or her employer or prospective employer.~~ I do not think that question was directly answered. If you have to inquire of the legal department in the office of the Attorney General (Mr. McMurtry) or, indeed, in the Ministry of Labour itself, I would appreciate--and I am sure other members of the committee, as well--getting a direct answer to that question.

Dr. Silverberg: I certainly will, Mr. Eves. You appreciate, I am sure, that the use of the word person there as opposed to employer is such that the clause can cover agents of the employer.

Mr. Eves: Yes, I appreciate that.

Dr. Silverberg: Not be too restrictive but the point you have raised is--

Mr. Eves: It also could literally cover agents of the employees.

Dr. Silverberg: I will get clarification of that point.

Mr. Chairman: Thank you, Mr. Eves. Mr. Renwick, you had a question?

Mr. Renwick: No, I have no other questions. Another time we can discuss that point.

Mr. Chairman: Thank you, Dr. Silverberg, for appearing and being so informative.

We have the problem of the three gentlemen who could not be on the agenda today. The clerk is making arrangements to schedule them hopefully on Wednesday. That is really all we can do at the present time. I move that we adjourn the meeting until after standing orders tomorrow afternoon.

The committee adjourned at 1:06 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

EMPLOYMENT STANDARDS AMENDMENT ACT

THURSDAY, NOVEMBER 3, 1983

Uncorrected draft copy



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Kolyn, A. (Lakeshore PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
Breithaupt, J. R. (Kitchener L)
Elston, M. J. (Huron-Bruce L)
Eves, E. L. (Parry Sound PC)
Gillies, P. A. (Brantford PC)
MacQuarrie, R. W. (Carleton East PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)
Taylor, J. A. (Prince Edward-Lennox PC)

Also taking part:

Gillies, P. A., Parliamentary Assistant to the Minister of Labour
(Brantford PC)
Mackenzie, R. W. (Hamilton East NDP)

Clerk: Arnott, D.

Witnesses:

Saxe, Dr. L., Department of Psychology, Boston University

From the Precious Metals Industry:

Bryson, P., Industrial Relations Manager, Johnson Matthey Limited
Dennis, C., Security Manager, Johnson Matthey Limited
Macpherson, A. J., Controller, Handy and Harman of Canada
McInnes, J., Vault Clerk, Engelhard Industries of Canada Limited
Thorp, W. A., Manager, Personnel and Industrial Relations,
Engelhard Industries of Canada Limited

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, November 3, 1983

The committee met at 3:15 p.m. in room 151.

THE EMPLOYMENT STANDARDS AMENDMENT ACT

The Vice-Chairman: Gentlemen, I will recognize a quorum. The chairman is busy in the House with regard to private members' legislation this afternoon.

I would point out to the committee that because of the number of other groups that either have been invited or requested an opportunity to appear, it appears that we will have to, along with next Wednesday, allow for sittings on Wednesday, November 16 and Thursday, November 17, on this amendment to the Employment Standards Act.

Does that meet with the approval of the committee?

Mr. Renwick: That means that the Ministry of Consumer and Commercial Relations estimates will be deferred for this bill? Why do we not just pass it and declare it a bill?

The Vice-Chairman: I was just informed by the clerk there does seem to be some flexibility in that we can adjust two or three days. I think this committee wanted those who expressed a wish, at least to the extent that we found it possible, to fit them in.

Mr. Renwick: I was not trying to be difficult. I had circulated to me from the House leaders to our caucus the revised projected start dates for estimates dated October 31, C.C.R., November 16. That is what I am looking at.

The Vice-Chairman: You are quite correct. However, I think it was the committee's wish, as I say, that we try to hear as many of those who requested or whom we have requested to come in. Have you passed out amended schedules to everyone? For example, if you look at the amended schedule you will see there are a number of additional organizations or representatives that wish to come in. I think it would be worthwhile, since this committee directed that we are in agreement, that we do allow the two additional days.

Mr. Renwick: Agreed.

The Vice-Chairman: Agreed? Agreed.

Mr. Renwick: I am opposed to it, but I do not imagine that will alter the world at all. I understand it is the House leaders who generally schedule the business. If we are going to defer the consideration of those estimates, I would suggest that we request the House for the opportunity to sit on one or two separate occasions in order to complete the work on this bill.

The Vice-Chairman: Maybe I can resolve it this way: either I or the chairman of the committee will discuss the pros and cons with the House leader but in the meantime indicate to him that there appears to be general consensus that we can go this way. However, I will draw your concerns as well to his attention.

Mr. Renwick: Thank you.

The Vice-Chairman: Before I call the first witness, I believe the parliamentary assistant requested the opportunity to make a couple of comments to the committee. Just before he begins, may I just check. Is Dr. Saxe here with us as yet?

Mr. Gillies: Mr. Chairman, I believe Dr. Saxe was expecting us to start about 3:30, so he may be en route.

The Vice-Chairman: I understand that he is flying up and has an immediate flight back almost.

Mr. Gillies: He is in the city, but he must be on his way here.

Mr. Spensieri: Mr. Chairman, while we are waiting and perhaps before the parliamentary assistant speaks, there was some suggestion made yesterday or the day before that at least in connection with the permissive section which allows the police force to retain the provisions of applying the polygraph test, it might have been instructive in connection with the Solicitor General's representatives to have representatives of various police forces who could give us some indication of the current usage and prevalence of the testing.

I am wondering whether an official invitation or request for attendance has gone out or can be so sent in short order.

The Vice-Chairman: I realize you are dealing with a specific police force, but I draw your attention to Wednesday, November 9. You have the Canadian Association of Police Polygraphists and, following them, the Ontario Association of Chiefs of Police appearing on November 9. I believe you were looking at an additional direction as well.

Mr. Spensieri: Specifically, I would have liked to have an invitation go out to the appropriate section of the Royal Canadian Mounted Police with a view to getting their practiced expertise-- ...

J-1525 follows

The Vice-Chairman: It was raised on our opening yesterday that, because they cannot themselves offer to come, this committee might see fit to invite representatives of the RCMP section that deals with polygraphs to attend this committee and give us the benefit of their experience. What is the committee's wish?

I should point out that if, in fact, you do hear them, if you look at our schedule, it would mean that we would also have to deal with them Thursday, November 17 and then begin clause by clause on the Friday morning. I draw that to your attention.

Mr. Mackenzie: Mr. Chairman, I am sort of wondering why, all of a sudden, we are dragging out what was supposed to be a few people and a day or two's event into several weeks of hearings. I am wondering, inasmuch as this is now happening, if there has been any advertising of groups.

There is an Ontario Federation of Labour group on here, I can inform you, only because I called them when others were making representations. There was no advertising that I knew of. They, of course, had a vital interest in it. It is not that they particularly wanted to. Certainly the information we had was that this was not a long process. Just what gives? What is going on here?

The Vice-Chairman: First, I think part of the growth in numbers is due to, in fact, this committee. I am giving a personal observation that this committee, in fact, has indicated they wanted to hear people. There was nothing specified other than that. In fact, I believe was either you or Mr. Renwick who suggested the chiefs of police.

Mr. Renwick: That is a pretty broad blanket you are covering there. I certainly did not request a lot of people to come. I said that if we were going to hear the representatives that we are hearing and if there is an exception in the bill with respect to the police, I thought it would be interesting to hear what the police, in their various arms, have to say.

The request that I made was for the Ontario Police Commission or the Ontario Provincial Police. Somebody then said the Ministry of the Solicitor General and Mr. Ritchie is coming for that. Now I see we have got the Association of Police Polygraphists and we have got the Ontario Association of Chiefs of Police. One of the witnesses yesterday made the suggestion that we would be remiss in our duties if we did not hear the RCMP. I wonder whether we would be remiss, since a number of the witnesses are coming from the United States, if we did not ask the director of the Federal Bureau of Investigation to come along too.

We could fill ;in from now until Christmas on this bill.

The Vice-Chairman: Undoubtedly you could.

Mr. Mackenzie: I want to make one thing clear. The minister did come to me as labour critic when this bill was coming in and when we got the batch of material and in brief conversations I had with him I indicated that we would be supporting it, as became obvious so would the other opposition party in the House very early in the game. We were asked how we wanted to handle it and we said let it go through. We have got no reason to raise any issues.

He then came back to me and said there are a few groups that wish to voice their displeasure. "We should send it out for a day," I think is what he first said to me. We said we will not deny them the right. We have no reason to object to that, although we do not really see the reason if there is general support from all of the parties.

The point I am really making is if all of a sudden a lobby is launched against the particular bill, there probably should be some advertising. You sure as blazes could fill it from now till next year with people.

I really wonder what we are doing. Are we trying to find a way out? What the heck is going on in the deal?

Mr. Gillies: With respect to your comments, the position of the ministry is precisely the same as indicated to you by the minister in the first place. We are very appreciative of the three-party support for the bill. It is our intention to proceed.

In terms of however many days of hearings the committee wishes to have, I am in the hands of the committee. The wish of the ministry was that anyone who wishes to make their views known be heard, but I can appreciate your concerns.

Mr. Mackenzie: You are backing is all I am saying. If the approach is to just let those who are opposing the bill--

The Vice-Chairman: I have to interject there. I quite honestly, and I say this strictly as a member of the committee and having to fill this role at least for the interim period, I am not aware--certainly I know that I have not asked for any specific witnesses. Most of what we are dealing with, in fact, has come really through this committee. There has been no advertising at all that I am aware of. ~~Word of mouth~~

J-1530 follows



The Vice-Chairman:

Word of mouth has obviously created a request from people to be heard. I think we have to limit the time. Quite frankly, I tend to agree with you.

The motion has been made, however, within this committee today to entertain an invitation to the RCMP. They may not, in fact, respond that they are coming, in which case the schedule will stay as is. I felt it necessary to point out that if, in fact, committee concur that that invitation should be made, then I see a problem with timing and it is my duty to point that out to the committee.

Mr. Mackenzie: Just one final point, in that line, seeing for the first time now that you have now scheduled as well Wednesday, November 16, I do not know what arrangements are being made. This bill is of some concern to me as the labour critic in my caucus. The Ministry of Labour estimates start that day and we are all afternoon on Wednesday on them. We have, as you know, some major issues we will be dealing with, whether it is retraining programs or what have you, all through those labour estimates.

I do not know how you are in two places at once. We have a very schedule of estimates. I have some serious questions about how you are going to do it.

The Vice-Chairman: I think the parliamentary assistant for the Ministry of Labour did point out that, in fact, there seems to be all-party support, at least at this point, although we are giving the benefit to ourselves to hear arguments pro and con. I recognize the problem you are talking about with estimates, but surely that is a problem that faces all of the members of this committee. We all have those duties to fall into.

I am at the committee's direction. The motion has been made by Mr. Spensieri and I will call it. I guess that is the only option I have available. Will the committee please provide some direction. Do we invite the--

Mr. Eves: Mr. Chairman, is it not possible, if, in fact, the RCMP responds in a positive fashion to such a request, can we not put them in somewhere or somehow?

The Vice-Chairman: I do not think it would be appropriate really, looking at the schedule. I am giving you my own opinion.

Mr. Eves: I do share Mr. Mackenzie's concerns that we could drag this out indefinitely. We started out with two or three days of hearings and now we have five or six days of hearings. I suppose we could have seven or eight, and we could have 19 or 20, too.

Mr. Mackenzie: I can guarantee you a lot more than that. That is what they are looking for.

The Vice-Chairman: I see some difficulty in my own mind, but, again, the direction comes to me from the committee. I do see some difficulty with attempting to put them in--assuming they

The Vice-Chairman

accept, if that invitation is approved by the committee--putting them in with the balance of the police people who are coming in. As you can see, the schedule is extremely tight.

Listen, I am not saying we would have to go to Friday. I am saying that in my opinion it seems to be a possibility on what is scheduled here.

Mr. Eves: Do all these delegations require 45 minutes?

The Vice-Chairman: I would personally hope not, and as long as I am in the chair I will try to keep it moving as quickly as we can. May I ask for some direction from the committee please?

Mr. Gillies: Mr. Chairman, could I just suggest, Professor Saxe is here now and in view of his time problem perhaps we could defer this discussion until six o'clock.

The Vice-Chairman: I think this can be resolved very quickly. Do I have agreement on Mr. Spensieri's motion? Are we in favour of the invitation? Could I have a show of hands please?

Mr. Renwick: I would ask that my good friend, Mr. Spensieri, agree that we would defer consideration of that motion for the present time until we hear what our own people have to say. John Ritchie is coming, along with, I see, the Ontario Association of Chiefs of Police and others. Would my colleague defer? Perhaps we could see the Royal Canadian Mounted Police at the Royal Agricultural Winter Fair on a musical ride or something like that.

The Vice-Chairman: Mr. Spensieri, you have heard the request for deferral.

Mr. Spensieri: There is only one concern and that is the fact that the day before yesterday, primarily through the testimony of Mr. Fallis, we came to understand, and I think I came to understand it for the first time, that there is much more here than employment standards legislation.

I think we would very simply remiss if in conjunction with the deputation by the Canadian Association of Police Polygraphists we did not also hear from a responsible law enforcement agency. Perhaps Wednesday, November 9 would be a good time to schedule it in, along with the Canadian Association of Police Chiefs.

The Vice-Chairman: All right, without adjusting the schedule, Mr. Spensieri chooses not to withdraw his motion. What is the committee's wish, attempt to invite them to fit into the schedule as it presently exists? Do I have agreement?

May I then call Dr. Saxe--

J-1535 follows



~~(Mr. Vice Chairman)~~

~~...committee's wish to attempt to invite them to fit into the schedule as it presently exists.~~

~~Agreed.~~

~~The Vice Chairman: May I then call Dr. Saxe.~~

→ Interjection.

The Vice-Chairman: I will get Dr. Saxe, if he would come at least to the table, so that we can get ready. The parliamentary assistant--

Mr. Gillies: Mr. Chairman, just very briefly, arising out of yesterday's hearings, I wanted to assure both the delegations and the members who expressed concern about subclause 39(b)(2)(ii) that we are now actively considering the point raised I believe particularly by Mr. Eves.

Mr. Eves: And Mr. Spensieri.

Mr. Gillies: And Mr. Spensieri. We are now considering that in the ministry, and I will be in a position to offer you our feelings on whether or not that should be amended next Wednesday.

Mr. Renwick: I would express my very serious concern if the ministry is submitting to that kind of argument without a very thorough consideration in this committee about it.

Mr. Gillies: I can appreciate your concern, Mr. Renwick. That is why we are--

Mr. Renwick: I had a sensation yesterday that there was a certain wilting going on around the table and certainly the list of people here would indicate to me that this kind of overt pressure will produce that kind of amendment. I expressed my reservation yesterday about that kind of pseudo-voluntary suggestion, which was made and which appeared to be gathering momentum around the table. I would hope that whatever consideration your ministry is giving that the representative of your ministry who is giving the consideration to it would do us the courtesy of coming before the committee so that we can get to the bottom of the simplistic solution that appeared to be kicking around the table here yesterday.

The Vice-Chairman: Thank you, Mr. Renwick. Was there anything else?

Mr. Gillies: There was one other point, if I might, Mr. Chairman.

Rest assured, Mr. Renwick, there will be no dramatic change without full consultation with members of the committee.

Mr. Renwick: I consider that to be a dramatic change. I can sense what is happening here now. You are going to get a bill out of this committee, and we are going to preserve the right of the police to use the polygraph. That is what is happening here, and it is very clear what is happening. I want people to understand. Either we defer it to the point where we hold a series of hearings on this whole question after the House prorogues in December, so that we can deal adequately with it, but this creeping paralysis of this piece of legislation is something which I find is a bastardization of the process.

There is no advertising, as my colleague has said. Instead of one morning and one afternoon, we are now encroaching on other estimates of immense importance to the assembly, and I do not particularly like that process of legislation.

Mr. Gillies: The other point--

Mr. Renwick: It is contrary to the principle of the bill which was passed by all three parties in the House, that so far as employer-employee relationships are concerned, there would be no polygraphy--whatever you call the machine--tests of any kind. Now we are creeping around to the very fallacy which is involved in the bill. I am upset to hear the parliamentary assistant once say, "It is our firm belief that we are going to pursue this bill," and then toss in that they are giving consideration to a suitable amendment to the bill which will gut the whole operation to protect employees in the province.

Mr. Gillies: With respect--

The Vice-Chairman: Order.

Mr. Gillies: Mr. Chairman, if I may respond to that--

Mr. Renwick: It is not a question of order. I am not out of order.

Mr. Gillies: All I said to the members of the committee was that the ministry was considering whether the arguments made yesterday were valid or not and whether or not we will entertain an amendment. I am not in a position to tell you that now. I will be next Wednesday.

Mr. Renwick: Thank you.

Mr. Gillies: There was also concern expressed by at least one of the delegations yesterday that the information and research on which the ministry had based a lot of its concerns in this area was outdated, and so with an eye to that, I am asking the Clerk to distribute to members of the committee testimony given two weeks ago by Dr. John H. Gibbons, who is director of the office of technology assessment, the United States Congress, to a subcommittee on legislation and national security of the House of Representatives. This is very fresh obviously, being two weeks old, and I would draw members' attention particularly to several points raised in it.

Mr. Renwick: Is this formally before us now?

The Vice-Chairman: It has been distributed to you, I understand.

Mr. Renwick: I am asking a very technical procedural question. If I walk in here with a piece of paper, can I distribute it around and have us discuss it? Is it here as an exhibit before this committee or not?

Interjection.

Mr. Renwick: We are on a very slippery road, gentlemen, and we might as well know it now and jack ourselves up and get on with the business efficiently and properly.

The Vice-Chairman: I think, with respect to the parliamentary assistant, we will hold that if we may. I recognize the point you are trying to make. Let us proceed with it, and if we finish on time this afternoon, then perhaps we might get a chance to deal with it.

Dr. Saxe, I apologize for the delay in time. We had hoped to start right on time. Would you please introduce yourself to the committee, into the microphone so you can be heard.

Dr. Saxe: I am Leonard Saxe, and I am a professor of psychology at Boston University, and I am the principal author of the US Congress technology assessment study, which was entitled The Scientific Validity of Polygraph Testing, and on which Dr. Gibbons and I testified before the House of Representatives two weeks. I have a PhD in psychology, and I am the author of various books on research methodology and study of public policy. I am here as an individual and not as a representative of the US Congress or Boston University.

I would like, if it is permissible--

Mr. MacQuarrie: You graduated when and where?

Dr. Saxe: I graduated in 1976 from the University of Pittsburgh, with a PhD, and I have been a professor ever since at Boston.

If it is permissible, what I would like to do is just briefly describe to you the study that Office of Technology Assessment conducted and describe our findings as they are relevant to the bill that you have under consideration. I will try to do this as quickly as I can.

The study was conducted by the Office of Technology Assessment in response to congressional review of several proposals by the government to expand the use of polygraph tests to government employees. The study dealt only with scientific issues. We were asked to look at the reliability and validity of polygraph testing and not consider other issues such as ethics, civil rights, etc.

Dr. Saxe


The study involved a very careful and systematic review of all available scientific theory and evidence on polygraph testing. It involved discussion with experts on polygraph testing, practising polygraph examiners, site visits to field facilities, observation of polygraph tests, etc. It involved a quantitative analysis of available research evidence, and the work that we did was reviewed by a panel of approximately 15 scientists and included individuals who are both pro-polygraph and anti-polygraph.

Let me try to describe to you the findings of this investigation. The first finding, and probably the most important one, is that the polygraph does not appear to be a "lie detector." There is, in fact, no unique physiological response to lying. The polygraph is probably best viewed as a form of interrogation. It is very important to note that there are a number of different interrogation methods which are variously called polygraph tests, and that these procedures, one of which is called the relevant-irrelevant test, another which is called the control question test and others which are called concealed information tests, are used in different situations. In a screening pre-employment situation, for example, a version of the relevant-irrelevant procedure is used. In specific issue criminal investigations, the control question test is used.

There has been a fair amount of scientific controversy about polygraph testing. I do not want to come before you and say that everyone agrees about the situation. That is not a statement that can be made. The controversy, however, as best as I can determine it, has arisen because of a failure to distinguish between the different types of testing procedures and the different situations in which it can be used. Even more important, this controversy has arisen because of some simple misunderstandings of terminology. I do not want to make this like a lecture, but let me just give you three terms which I think are important to understand the problems with the polygraph.

~~The first one is reliability. Reliability is essentially..~~

J1545 follows



Dr. Saxe

~~misunderstanding of terminology. I do not want to make this like a lecture but let me give you three terms which I think are important to understand the problems with the polygraph.~~

→ The first one is reliability. Reliability is essentially consistency--how repeatable is the outcome of an examination. The problem is that you can have a reliable test, one that gives you the same answer each time it is given but it may be an inaccurate one. Accuracy is usually talked about as validity. The only way to assess validity in a polygraph study is to have some independent means of verifying what polygraph people call ground truth--what is the actual truth in a situation.

The third concept that is important is the notion of utility. That in fact you may be correctly identifying people who are being deceptive, dishonest, what have you, but it may be for the wrong reasons or you may be preventing people from engaging in criminal acts. It may not be because the polygraph test works; it may be for some other reason.

In reviewing the evidence on the polygraph--and I must say that our review does not correspond to what I understand some other reviews that have been presented to you--it indicates a couple of things. One is that for the screening use of the polygraph, particularly in employment situation, there is virtually no data. There is virtually no scientific research that indicates whether there are going to be large errors, whether they are going to be large or small amounts of accuracy.

Almost all of the research deals with control question tests in specific issue criminal investigations. The average accuracy of these studies is somewhere in the range of 70 per cent to 90 per cent. I give you that figure and other people will give you figures in the 90 per cent range, other people will give you figures in the 60 per cent range. While there is a right answer, it probably does not matter very much because the research studies are different situations. In terms of the employment setting are typically conducted in very different situations than the employment situation.

Some of the differences in rates have to do with how you handle what are called inconclusives when you examine or cannot make a decision about whether the person is deceptive or nondeceptive. It also turns out that there are a variety of factors. If you look at the research literature and some of the most recent studies, there is a tremendous amount of variability in the outcome. You get outcomes all across the board. The question is: Why do these occur? It turns out that such factors as the examiner's skill on the subject, motivation, drugs or other measures that the subject is using to avoid detection, all of these may play an important role on whether the examination is accurate or not.

Probably the most important of what are called countermeasures are a set of countermeasures that I believe may be

Dr. Saxe

employed by individuals who have knowledge about what a polygraph test does and have some experience in taking such a polygraph test. Physicians use the term placebo to refer to drugs that are inefficacious but people take them and they think they are helping them. Psychologists have used the term "bogus pipeline".

The underlining idea is that if people believe a technique works, it does work. So very often what you get in polygraph tests is you get an individual confessing or providing information simply because they are afraid of the situation, the situation has intimidated them. In fact, there is some reason to believe that the arousal that is being picked up in a polygraph test, is arousal produced not by lying but by fear--fear of being detected. Depending on whether a person is susceptible to that kind of fear, the polygraph exam may be valid or invalid.

Let me share a couple of my own conclusions about the situation. I would be glad to answer any questions that you may have. I do not doubt that some of the claims for polygraph testing and that polygraph tests, when implemented in organizations, have been able to reduce crime, identify people who were doing dishonest things. I think it is important, however, to recognize that the mechanism for those identifications may not be detecting truth or falsehood but instilling fear in individuals in such a setting. Unfortunately--

J1550 follows

elt
(Dr. Saxe)

~~But instilling fear in individuals in such a setting.~~
Unfortunately, depending upon who is susceptible to that fear, you may or may not catch the appropriate individuals.

It is also important to recognize that we have no direct evidence and relatively poor indirect evidence. We have no way to predict what the accuracy and number of errors are going to be when polygraph tests are used in employment settings. Pre-employment and post-employment screening--as I mentioned before--there is virtually no data about it.

A specific incident investigations are a slightly different matter. But I would remind you of my earlier comment that in such situations, the places where the data has been collected are very different than employment contacts. That is the end of my prepared comments. I would be pleased to answer any questions.

Mr. MacQuarrie: Dr. Saxe, prospective employers, in terms of interviewing or hiring of employees, make use of a variety of techniques, one of them being a psychological assessment by consulting psychologists or what have you. I take it you are familiar with this sort of thing. Would that sort of assessment disclose the same sort of information with respect to a person's reliability, integrity, etc. that, for instance, the best polygraph results would provide?

Dr. Saxe: A psychological test yields a psychological answer. It yields a characterization of the person's character--personality is the term used most often by psychologist. What a polygraph examination does, although it is in fact a psychological test, it comes up with a nonpsychological outcome. Is this person an honest person or have they committed specific honest or dishonest acts. Typically in a pre-employment examination--although there is wide variation in how these examinations are conducted even within a specific area, the attempt is to determine whether the specific information on the pre-employment application is accurate or inaccurate. That is very different from making a psychological characterization or psychological prediction about a person.

Mr. MacQuarrie: But would the psychological characterization or definition of a person disclose shall we say inherent defects in personality that would lead the psychologist involved to say: "Look, this person might ?? or not."

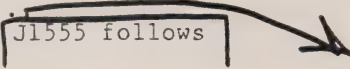
Dr. Saxe: Those are very difficult determinations for psychologists to make. It is very difficult to make. The further away or the closer you get to actual behaviour, the more difficult it is to be able to predict ahead of time how a person is going to act in a job. I do not believe that is typically how such tests are employed.

Mr. Renwick: Mr. Chairman, perhaps Dr. Saxe would be good enough to elaborate a little bit on his specific qualifications on an expert person appearing before this committee and at whose request are you here or is it on your own initiative.

Dr. Saxe: The Ministry of Labour asked that I attend this hearing. They have been in contact with us regarding the study we were conducting for the office of technology assessment. I am not a polygraph examiner nor have I done individual research on polygraph tests. My expertise is in research, evaluation and methodology. My expertise is in the evaluation and synthesis of research.

I was specifically asked by the office of technology assessment to conduct this study because they felt that someone who had not been involved...

J1555 follows



(Dr. Saxe)

~~I was specifically asked by the office of Technology Assessment to conduct this study because they felt that someone who had not been involved in the area could be more objective and could conduct an even handed assessment of the available evidence.~~

Mr. Renwick: And your specific academic qualifications?

Dr. Saxe: I have a PhD in psychology, also a master's degree in psychology.

Mr. Renwick: From--?

Dr. Saxe: From the University of Pittsburgh in both cases, and I am currently on the graduate faculty of Boston University.

Mr. Renwick: Do you feel that this document that the parliamentary assistant has distributed to us, the testimony of Dr. John H. Gibbons, director, before the United States Congress subcommittee of legislation and national security in the U.S. House of Representatives where you are named, "With me today are Dr. Fred B. Wood, the OTA project director, and Dr. Leonard Saxe of Boston University."

Would you feel at this point that you could perhaps comment on each of the 10 points that are in this document?

Dr. Saxe: I do not have a copy of it handy.

The Vice-Chairman: Would you see that Dr. Saxe gets a copy?

Mr. Renwick: If you would care not to comment about them, that is fine. Dr. Gibbons said, "Mr. Chairman, I want to make 10 points today," and he goes through each one of the 10 points. Could you help the committee by going through this memorandum for us?

Dr. Saxe: I could. Do you want me to go through it?

Mr. Renwick: I would appreciate it if you would, and if it is agreeable to the committee.

Dr. Saxe: The reason why I chose a slightly different way to describe the results of the OTA study was that the congressional issue has to do with national security and you are given a slightly different question. Let me go through the items.

The first one, the polygraph is not simply a machine, is essentially the point that I made. It is not a lie detector, it is really an interrogation device. Stop me if you would like me to add anything to that.

(Dr. Saxe)

It had been difficult to conduct research, and I guess Dr. Gibbons' second point was we started out, we looked at over 3,500 citations to literature about polygraph examinations. When we finally got through, there were perhaps 35 studies that seemed worth looking at, that had met scientific criteria. It appears to be very difficult to do polygraph research. The laboratory research that has been conducted, while it is simply doing studies in the real world, it is hard to know if you can simulate in the laboratory the real world conditions. That was the second point.

The third point was something that I also mentioned, that, while you can come up with statistics, and somebody can say 90 per cent accurate or 70 per cent accurate, or what have you, that is really an inappropriate way to summarize what is in the research that you need to look at, what are called the false positives and negatives, and that the evidence depends on particular application. For example, some people have talked about the polygraph as being 95 per cent accurate and failed to qualify that by saying that the data that such figures are based on come from specific issue criminal investigations, not from employment situations, not from a wide range of crimes, etc. That was the third point.

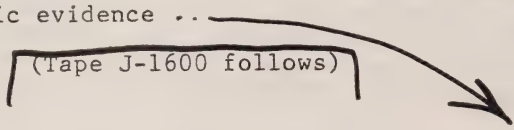
The fourth point is parallel to that, but only in the area of specific incident criminal investigations are there any reasonable research studies.

The fifth point, at the bottom of page 2, that is where essentially we describe the range of results, the 98 per cent is a unique outcome, and most of the studies are between 70 and 90 per cent.

The fifth point should be self evident.

The sixth point is what I said in my opening remarks, that there is no scientific evidence ..

(Tape J-1600 follows)



(Dr. Saxe)

that there is no scientific evidence to establish the validity of polygraph testing for screening a large number of people.

Mr. Mackenzie: Dr. Saxe, before we leave, if we could go back to the fifth for a moment, the further one gets away from the conditions of a criminal investigation, the weaker the scientific evidence for polygraph validity. Are they saying in that that the issue or the intensity of the issue is a factor in the kind of reaction you are going to get?

Dr. Saxe: Just to give you a glimpse of it, there is some evidence that indicates that you get more highly valid, accurate polygraph test decisions in cases of crimes against persons versus crimes against property. That would support your hypothesis that, in fact, when there is affect associated with a particular criminal activity, it may be more reasonable for the polygraph to pick that up.

It is also problematic because, in such situations, whether or not you are being deceptive in answering questions about that situation, that situation may be arousing.

Mr. Mackenzie: That would also tend to verify the argument I think I heard you making earlier, that fear can be a factor as much as truth in the reaction to the testing.

Dr. Saxe: I can say one other thing about the fifth point and I do not know whether it is imbedded in one of our other points here. By using the term "criminal investigation" we refer to the fact that in most cases, at least in the states and certainly in the Federal Bureau of Investigation, when policy agencies use polygraph examinations, they use it at any stage in an investigation, when they have already collected a lot of information and they have a pretty good guess about whether a person is guilty or not.

I will just give you an illustration. Essentially what that does is it changes the base rate of the examination. Just to give you an example of that, let us say that there are 50 people in this room right now and that something happens here, some criminal action takes place and, like in an Agatha Christie novel, we know that one person did it. I have spent only one day at polygraph school, but I bet you if there are 50 people here and only one person did it, I could achieve 98 per cent accuracy by polygraphing everybody because all I have to do is call everybody innocent and I would make one mistake, so in 98 per cent of the cases I would be correct. That is why the conditions of a criminal examination are so important.

The seventh point has to do specifically with security screening. In reviewing the literature, I had a great deal of difficulty in being able to establish that the situation in national security was directly parallel to a criminal investigation or a preemployment or postemployment situation in a company. The reason is that individuals involved in national

(Dr. Saxe)

security are much more likely to have access to information about polygraph tests, as well as experience in taking polygraph tests, etc.

In addition, because the issues are so important, and because somebody who is asked about national security may be so concerned with the issue, whether or not they have done anything wrong, that it is difficult to generalize the available information to those situations.

The eighth point is just another way of stating the point that I made, having to do with utility. Yes, the Central Intelligence Agency and the National Security Agency believe that it is a useful tool and, in fact, it may be for them a useful tool but it works, not because they detect lies, but because they intimidate people, in essence.

Number nine, this is the problem that if, let us say, the polygraph is 95 per cent accurate and you have a five per cent error rate. The administration in Washington was proposing in the Department of Defence screening 15,000 or 16,000 people a year. If you screen 15,000 people a year and you are wrong five per cent of the time...

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(Tape J-1605 follows)

(Dr. Saxe)

... in Washington was preparing the Department of Defense for a 15,000 or 16,000 people a year. If you screen 16,000 people a year and you are wrong five per cent of the time, that is something like 800 people who are going to be misidentified. If half of those people are spies who you are missing and you do not investigate them further, then you have got a serious security problem. If half of them are honest employees who you incorrectly identified, then you are investigating upstanding people and wasting your resources. That is if it is 95 per cent accurate. Think of what would be the situation if it were 70 per cent accurate or 80 per cent accurate.

10. This has to do with the fact that if the polygraph is going to continue to be used, then we were asked specifically by the committee to suggest what research should be conducted. It seemed clear to us that if you are going to continue to use the polygraph, you should at least conduct research on counter measures, ways of beating the polygraph, and try to assess its validity, so that at least in the future more informed decision making could be ??

Mr. Renwick: Mr. Chairman, perhaps I could ask one or two other questions in relation to this. In the Office of Technology Assessment, in this particular project, did you have any opportunity to consider the civil liberties aspect of the question with respect to the right of a person not to be interrogated without warning and any civil libertarian aspects of it?

Dr. Saxe: I have read some of the literature on it, but did not really consider it in depth.

Mr. Renwick: It is now being considered in depth?

Dr. Saxe: No. I said it was not something we considered in depth. I will leave it at that.

Mr. Renwick: In your capacity as a psychologist, could you help me with a problem which came out of the hearings we had yesterday, which I do not understand? The bill which is before us is for practical purposes an exclusionary bill from the use of the polygraph testing system in employer-employee relationships, and there is a concern expressed by members of the committee as a result of the submissions. There were some submissions made that the total exclusion was in a sense an infringement of a person's liberty and that a person either seeking employment or in employment where questions arise with respect to his eligibility to continue in employment, that person should be able to volunteer to take the test, and the words which were used, "in order to prove his innocence."

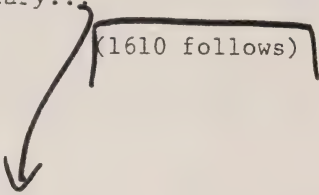
Could you give me some assistance on the nature of the voluntary act that is involved in that? Is that a voluntary act in the sense that a person has established circumstances in which you are in opposition of saying, "I now have to make an effort on my part to disprove what is being said about me"?

Dr. Saxe: It is a bit out of my purview in terms of evaluating the research evidence. What I would say is that there are degrees of voluntariness, and obviously, if the option is open to a person to take a polygraph examination and that person is made aware of that option, it may be perceived as coercive and the decision to take the exam may not be a voluntary one. Again, I just reiterate that my concern is with the validity of the test. Is it accurate? Would that be a reasonable thing for a person to do?

Mr. Renwick: Would you think any conclusion could be drawn between two persons, one of whom volunteered and one of whom did not volunteer as to--

Dr. Saxe: Voluntariness does affect the examination, that in the involuntary...

(1610 follows)



Dr. Saxe:

~~... examination, depending upon the examiner's attitude, there is a possibility of a false positive if the person is anxious about it.~~

There are lots of polygraph test cases, the most recent of which is DeLorean case currently being tried in Los Angeles where he asked his attorney to arrange a polygraph examination and he passed it. The government did not believe it and so they conducted it, using a Federal Bureau of Investigation agent and the FBI found that he was being deceptive. Then what do you do?

There are a number of situations where a person asks for an exam, gets one decision, the government does it, or prosecution does it and gets another answer.

Mr. Renwick: Could you describe for us in words, if you were an observer and I was to walk into a room to take a test, what happens to me in relation to equipment? What is the degree of restraint? What exactly is the physical equipment? What exactly is the test to which I am subjected in the course of a test?

Dr. Saxe: I will try to do this quickly because it is a complicated procedure. Basically, and it depends a bit about whether the exam is a screening exam or a specific incident exam, there is a pre-test where you talk with the examiner about the situation and where the examiner constructs questions which you are told about and have an opportunity to clarify with the examiner. That may last up to an hour or sometimes an hour and a half.

There are then over a period of time--it could be an hour, it could be two hours--a series of charts run. Usually, it does not take more than three or four minutes to actually go through a series of questions and take physiological recordings. During that time there is a ??pneumograph attached to your fingers.

Mr. Renwick: Electrodes attached to your fingers?

Dr. Saxe: Right, to measure what is your dermal response. They are basically simple measure of physiological responsiveness. There has been some improvement in the equipment over the last few years, although I do not think it significantly affects the quality of the test. Essentially, what they are able to do is electronically enhance blood pressure reading so that the cuff does not have to be as tight on your arm.

That is basically the procedure. The specifics of it depend upon the training of the examiner, the purpose of the examination and the co-operation of the examinee.

Mr. Renwick: This is my last question. Could you give me some sense as to what the qualified examiner is provided with in relation to the kinds of questions which are going to be asked?

Dr. Saxe: Again, it depends upon the situation. It depends whether it is the end stage of an investigation where they

may have a lot of information, it depends whether it is a screening exam where all they may have is the employment form that the individual has completed. It also depends upon the training.

The federal examiners or people in the United States who are trained by the federal government at their polygraph training school have a kind of objective set down procedure. Examiners trained in other schools use a variety of procedures and they have different forms of information collected. In some cases videotapes or audiotapes are actually made of the examination, in other cases they are not.

Mr. Renwick: Thank you, Mr. Chairman.

Mr. Chairman: Thank you, Mr. Renwick. Are there any further questions for the witness?

Mr. Spensieri: I want some assistance in a situation which I understand will also have to be necessarily hypothetical because as you say...
[redacted] follows.

J 1615-1



~~Mr. Saxe: Thank you, Mr. Benfield. Are there any further questions?~~

Mr. Spensieri: ~~In Toronto, and I, the situation which~~
~~and I have to be necessarily sympathetic~~
~~to the~~ y, there is not too much body of evidence in the area of using the polygraph as a pre-employment screening device. Let us say that I am an employer who in the course of a year would see up to 300 or 400 job applicants, say, production workers, and I have no intention whatsoever of ever engaging the professional services of a polygraph. All I have is a standard application form and I would call in the employee, the prospective employee, and say, "Did you fill out this form? Is it true what you put here? Are you willing to submit to a polygraph test?"

What, in your opinion, as a psychologist, on the basis of your evidence--what is the effect of the mere asking of that question?

Dr. Saxe: I have not looked very closely and there is not very much good evidence on how people feel about polygraph tests, and one of the things I suspect is that people's views of it are changing every day. The articles in the newspaper yesterday or this morning here in Toronto probably changed some people's opinions--made them more or less willing to take the exam. In general, though, the threat of having to take a polygraph test--is seen as a threat and is seen as very stressful event.

Mr. Spensieri: In your estimation, if the response were to be negative, "No, I am not willing to submit to a test." Would that lead you, as a prospective employer, and you as a person who is familiar with, at least the psychological aspect, would that lead to the conclusion that this person must necessarily be hiding something and therefore is not a proper subject to be hired?

Dr. Saxe: I must say that, first, there was a school of thought, the Reid technique--John Reid who is the head of a polygraph firm in Chicago and he is also the co-author of the leading textbook on polygraph science--believe that behavioural symptoms or so-called behavioural symptoms answer to questions such as, "Would you be willing to take a polygraph exam," and how you responded were important indicators. As a psychologist I think there are lots of reasons why a person answers yes or no, and it bears no relationship to their underlying honesty or their ability to perform the job.

Mr. Spensieri: For the purposes of this legislation, how crucial to the success or otherwise of this amendment is the prohibition against asking that question?

Dr. Saxe: It is a difficult question for me to answer. All I can say is that it is claimed by some that the--you know, the fact an employer could say something like, "I cannot ask you to take a polygraph exam, but I have heard that they exist and that people in your situation have been able to clear themselves," that that is perceived to be coercion. Now, some of this I do not


Dr. Saxe)

know directly, and I know it indirectly in my state, Massachusetts, there is legislation that has been on the books for some time that is very similar to a bill being considered here. At least, the news media, in some recent report, indicates that the law is being widely flouted, that people are in fact being required to take polygraph exams and some of it comes about by people "volunteering" to take polygraph tests.

Mr. Chairman: Any further questions by any other member? If not, thank you Dr. Saxe for being with us here. We certainly appreciate it as a committee. I think we will move on to the precious metal industry??with a number of people here. As I understand it, the main spokesman will be Peter Bryson, and would you please introduce your colleagues at the table.

Mr. Bryson: To my left, Mr. Bill Thorp is Engelhard Industries, personnel manager. This gentleman, Mr. Charles Dennis, is the security manager at Johnson Matthey; and Mr. Macpherson is of Handy and Harman. They represent the three major precious metals houses in Canada.

J-1620 Follows



~~represent the three major precious metal houses in Canada.~~

Mr. Chairman: Would you please proceed with your presentation?

Mr. Bryson: If you do not mind, gentlemen, I would like to read from the prepared text. I am not accustomed to freelancing.

The management and employees of Johnson Matthey Ltd., Engelhard Industries of Canada Ltd. and Handy and Harman of Canada Ltd. would like to express our appreciation for this opportunity to better acquaint you with some of the concerns of our industry and the impact of Bill 68 as it is presently worded.

I believe that it would be helpful to lead you through the business cycle of gold in order to orient you as to our role as refiners and manufacturers.

The original cycle of gold begins when ore is extracted from mines melted into doré bars, shipped to a refiner for refining into an acceptable standard of purity and alloyed with other metals, formed into products, consumed and scrapped.

Today, more typically, gold scrap is collected in various forms and alloys into a lot and sold to a refiner who converts the gold into a state of .9999 purity which is known as fine gold. Fine gold is then either cast into investment bars or fabricated into investment pieces bearing a hallmark of a reputable refiner and traded on the gold markets of the world. Please let me emphasize that it is the integrity of the refiner, earned over years of commercial activity, which makes his gold bars accepted on the world market.

Our problems begin with the collector assays a sample of his lot of scrap and strikes a bargain with the refiner who also assays a sample of the same lot. The purpose of an assay is to estimate the percentage of fine gold content which is in the lot. Since sampling and assaying are not precise sciences, the two parties either settle on the worth of the scrap or they go to an umpire, that is, they refer a third sample to an independent assayer, and accepts his determination of the percentage of gold in the lot.

Our problem as refiners is that we cannot determine what finite amount of gold we have bought until it is refined--therefore we must secure the refining area against theft and pilferage. This margin is critical when volumes of scrap are in the millions of ounces.

Often our customers have us hold their material on consignment and their gold must be secured against theft and pilferage--our reputation depends on the security of such inventories as does our repeat business and the jobs of our employees.

(Mr. Bryson)

Since the refining process involves dissolving the doré or impure bars into an electrolyte solution, the gold becomes dissolved in a nonmetallic form before it is collected as crystalline by electrolysis.

We prepare plating solutions for sale to our customers and these solutions contain gold in a nonmetallic liquid form for goldplating purposes.

Our companies also produce gold salts which are sold to make plating solutions. Again, gold is in a nonmetallic power form and comprises over 65 per cent of the mixture.


Metal detectors as employed in the courts, airports and precious metal houses, are of no value in detecting employee pilferage of these nonmetallic forms of precious metals.

This is one of our major applications for lie detection. At Johnson Matthey when employees exit the secured area of our plant, that is where the gold is kept, the employee is selected at random, given a PSE examination to determine if he has concealed any precious metal--

Mr. Renwick: Excuse me, what is a PSE examination?

Mr. Bryson: It is psychological stress evaluation.

(Tape J-1625 follows)



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November 3, 1983

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~~...selected at random, given a PSE examination to determine if he has concealed any precious metal~~

~~Mr. Renwick: What is a PSE examination?~~

~~Mr. Bryson: Psychological stress evaluation~~

Mr. Renwick: Thank you.

Mr. Bryson: The purpose of the examination is to determine if he has concealed any precious metal in ??nonmetal or metallic form on his person at that time. If the examiner determines that there is no indication of stress, the employee proceeds to the locker room to change and exits the building homeward bound. Should he show any stress indicating possible concealment of metal, he would be subject to a hands-on or strip search. There have been no incidents of personal search since 1976 when the use of PSE was instituted, and I might add there have been no noticeable known losses from our refineries.

As an employee, I would not welcome the removal of the intervening PSE examination by legislation, as I find a personal search to be a repugnant alternative. Given then that we have the problem of protecting our reputation as refiners, and given that we make our money by charging a refining fee, which is minute in comparison to the value of gold per ounce, we are also faced with the unpredictable world price of gold, silver and platinum group metals.

To demonstrate the impact of the fluctuating world market prices of metal on our products, and hence our risk and exposure to employee theft, the prices I quote will be 1976 prices when we began the use of PSE; 1980, when the prices peaked; and yesterday's prices. All are in Canadian dollars, and you can read for yourselves the relevant relationship.

Stated another way, a \$200 refining charge is only \$200, regardless if the market price of gold is US\$240 as it was in 1976 or US\$700 as it was in 1980. The higher the value of gold, the greater the temptation for employee theft, the greater the risk to our business and the jobs of our employees.

We are also vulnerable to employee theft in spite of the use of arch and hand metal detectors. As the current state of metal detection leaves much to be desired, it is not in the interests of our industry to enumerate ways in which metal can be taken undetected by employees through an arch, but they exist and are known by our security personnel.

We have brought some samples of fine golds, grain, plating material, plating salt and a metal detector to demonstrate the limitation of using metal detectors in the security of our products. If you would not mind, I would like Mr. Dennis to just show you some of those products because you would not be familiar with gold in its other states that we are as an industry.

(Mr. Bryson)

That is the plating solution that is used in the jewellery trade per se, and you will see it is a quite very much an liquid. That is some crystalline silver, which comes out of the refining baths. That is powdered golds. That is some plating salts; it is only 15 grams, and it is worth \$200, that little vial. grain. There is what one ounce of gold looks like. It is not huge, and it can be concealed readily. Now I will come down to a 10 gram piece, five grams, one gram. That is a kilo bar. I will not state the value of that, but you could buy a pretty good car for it.



1630 follows

~~... it is a little bit. I'll not state the name of the company, but you
could buy a pretty good one for \$100.~~

Mr. Gillies: Would you like to leave those with the clerk?

Mr. Bryson: They are not samples.

Mr. Chairman: Where is the security guard.

Mr. Dennis: Gentlemen, if I may, this is called a transfrisker. It is used in the industry. I am sure if any of you have walked through the airports and got on airplanes and what have you, and you did not make it through the arch, this is what you would be transfrisked with. It detects metal, but I bring you to the comment of Mr. Bryson on minus page 3. It says: "Metal detectors as employed in the courts, airports and precious metal houses, are of no value in detecting employee pilferage of these nonmetallic forms of precious metals."

To demonstrate that, I would just like to perhaps take the small one gram wafer which we can detect. I will take off my ring because it may be picking that up. In a field like that, it does detect the metal, but if you conceal it and I just simply conceal it in my hand--and I must point out at this time, when we transfrisk our employees, we do not come in physical contact with them. We do hold the metal detector away from them on account of the certain respect that is due to them. We do not badger them by touching them with the transfrisker. I concealed this little small gram in my hand and by running it over it, this being concealed in the palm of the hand, it is not detected. That is a problem and a big one.

Mr. Bryson: That is the salt I spoke of, gold cyanide. Does not detect at all.

Mr. Dennis: Just one other demonstration on the gold grain. That is one ounce of gold grain which is \$407 an ounce. It does detect, but if you even take that in a bottle form, and again once more conceal it in your hand, that will not be detected.

Mr. Bryson: Employees then, some represented by unions are owned by the United Steel Workers of America. Others who chose not to be so represented, have received tradeoffs from the employers in exchange for the necessary use of lie detection personal search.

For example, it is common practice in our industry to provide metal-free clothing. An employer pays time for surveillance interviews and employee searches.

Not unlike the deal made between the collector or customer and the refinery ourselves, an acceptable employer-employee bargain has been struck, using again an imprecise measure technique acceptable to both parties, and a third party has the alternative in the event our differences cannot be resolved. That is arbitration or litigation.

(Mr. Bryson)

We have included copies of previous written submission by our company for your careful consideration and review. As an industry, we respectfully request exemption from the proposed legislation as has been granted any police force in Ontario. The only difference between us and the police is that we use lie detection to prevent a theft, not to catch a thief.

We would be pleased to attempt to answer any questions members of the committee may have.

Mr. Chairman: Thank you for your presentation. Are there any questions?

Mr. Renwick: I would just like to clarify a few thoughts that occurred to me from your presentation. On page 3 of your presentation, you referred to--
J-1635-1 follows



Mr. Renwick: I would just like to clarify a few things. The company took from your presentation, on page 2 of your presentation, that at JML an employee is selected at random, given a P.S.E. examination to determine if he has concealed any precious metal. In the collective agreement, it says the company will generally employ random sampling procedure, but reserves the right to institute selective sampling as it deems necessary to ensure the security of its premise, of its resources.

What do you do now? Is it a random sample? Why would you make a decision to institute selective sampling?

Mr. Bryson: If we had a known loss there would be nothing random about the selection that day I can assure you. It would be total search of all employees.

Mr. Renwick: So what you are saying here is when you depart from a random sampling and institute a selective sampling, in fact it is everybody? Is that what you are saying?

Mr. Bryson: That is not what I said. I said, typically it would be random, yes. In the event of a known loss at any time, it would not be random, it would be 100 per cent.

Mr. Renwick: One hundred per cent.

Mr. Bryson: Yes it would sir.

Mr. Renwick: I do not think we are saying anything different. What other kind of sampling would there be between 100 per cent and random sampling?

Mr. Bryson: I know of no other that we employ in our company. I don't know if you do it Mr. Thorpe.

Mr. Thorpe: No I think in some areas. For instance, if there was a loss within a particular department, you would not want to subject employees to a search if they were not part of that department or have any participation in that department. It would be needless to search 180 people or 200 people if there had been five people involved with that particular process. You may want to be that selective.

Mr. Renwick: I can appreciate at the bottom of page 3, your statement that there have been no incidents of personal search since 1976 when the use of P.S.E. was instituted.

You say nothing about what the result of this has been. To what extent have you had losses?

Mr. Bryson: I can speak for our company. We have had loss where we have the P.S.E. The particular thief was under surveillance. He had been spotted on a surveillance check by P.S.E. He was found to smuggle what we call popcorn balls in a cigarette package by a guard. He was questioned by Mr. Dennis. He was immediately dismissed and the dismissal was great. It was to the point of arbitration prior to sitting in front of Palmer, the parties resolved the issue. The employee was not reinstated. The

Dr. Bryson

employee was simply given a letter stating that he worked for our company for a said period of time. Period full stop. That is one instance I can speak to.

Prior to 1976, our company had a loss of \$100,000 of gold, hence the change in profile. We used to have a very, very low profile, as did the industry, back when gold was \$35 an ounce.

If you see by the relationship of the values of our products, that even in 1976 it was considerably lower than it is today and tremendously lower than it was when gold, silver and platinum peaked in 1980.

Mr. Renwick: What exactly is a P.S.E. examination?

Mr. Bryson: Psychological stress.


Mr. Renwick: Yes, but what does it involve?

Mr. Bryson: What does it involve? It involves--I will give it to you as I understand it.

Mr. Renwick: What process do you go through?

Mr. Bryson: We go through a questioning process with the employee. Our particular concerns are, has he hidden some material to steal it? Has he stolen any material? Has he collaborated--

J-1640-1 follows



Mr. Bryson: ~~We go through a questioning process with the employee. Our particular concerns are has he hidden some material to steal it, has he stolen any material or has he collaborated with others to steal? Those are particular concerns.~~

Mr. Renwick: Who conducts the test?

Mr. Bryson: They are conducted by a technician who we employ.

Mr. Renwick: What equipment does he use?

Mr. Bryson: He uses what is called a PSE unit and a tape recorder. I will explain it this way.

At the one end of the pitch you have the pitch which is heard by a dog but that the human ear cannot hear. At the other end of the pitch is a low tremor that can be captured on a tape recorder at a specific speed. That speed can be reduced and it can be transcribed onto a tape which is similar to the tapes that electrocardiograms are put on. ??Is there a vein that people have their normal pattern and when they are stressed, that pattern will change significantly.

Essentially, when someone is stressed on what is called the "hot" question, that particular phenomena is discussed further with the employee.

Mr. Renwick: Is this test an inducement not to steal, or does it in fact catch the thief?

Mr. Bryson: We trust it is both.

Mr. Renwick: And has it caught the thief?

Mr. Bryson: Well, I did cite--

Mr. Renwick: You gave us the one example, and that was pretty inconclusive.

Mr. Bryson: What I can suggest to you is that what we do not do, if we have an unfavourable rating, if you like, we certainly do not turn around and accuse the man and dismiss him on the spot. We are not that irresponsible. We check it further. It is one particular tool that we use.

Mr. Renwick: When do you consult the police?

Mr. Bryson: I cannot speak to that, but I refer that to Mr. Dennis.

Mr. Dennis: --after a PSE examination where the individual cannot be cleared to the satisfaction of the examiner, I am filled in on the situation myself and I follow up with certain questions of my own to the person who we suspect and who has taken the PSE.

(Mr. Dennis)

If, through that examination or questioning period I am not satisfied with my findings, then I take it to management and try to express my feelings on it and what my questioning period has done.

After that, if we feel as if the person has not rightfully told us what we feel is not right, then at that time we call in the police.

Mr. Renwick: On how many occasions would you have had to call in the police since 1976?

Mr. Dennis: I can remember one occasion in which I was involved in. We called in the police once.

Mr. Renwick: And the result?

Mr. Dennis: That person was interrogated by the police department and came back to work.

Mr. Renwick: Apart from the PSE, what other improvements in plant security, in the security of your premises and your resources, have you instituted since 1976?

Mr. Dennis: Since 1976 we have spent a considerable amount of money, thousands of dollars, in trying to upgrade the security of our plants. It was since this time that I might mention that the loss that Mr. Bryson stated of about \$100,000 was a real blow to our insurance people. Our insurance, in turn, was cancelled for a period of six months where we actually did not have any insurance whatsoever. That is why security had to be improved and beefed up and had to be done so in a hurry. So since that time, we have...

↓
J-1645 follows

(Mr. Dennis)

~~So then is our security had to be improved and beefed up and had to be done so in a hurry.~~

So since that time, we have instigated certain areas throughout the plant that people are not allowed to go into unless they are authorized. There is only one way in and one way out. There is a dividing line which we differentiate as a secured and non-secured area. We have metallic arches. I think that we have, in Canada, incorporated the first computerized arch in which it is more convenient for the employee and has cut down a tremendous amount on personal ??trans-frisking searches which the employees certainly like themselves. They can get in and out quicker and they are certainly not subdued at being stopped and searched continuously.

Before this time, we went to what we call the pick a stick routine. I do not if anyone here is familiar with that, but it is a little bit antiquated and out of date but it was just a selection of sticks and when you had a coloured end, you would go in for a search. After, we went to the metal arch and the computerized arch. It is quite complicated to explain at this time how it works.

We have spent thousands of dollars--close to \$40-50,000--in metal-free clothing for our employees. When they come in to work they disregard their own personal streetclothes in a locker room and put on metal-free clothing right down to shoes and go to work. When they come out, they naturally have to come out metal-free or they don't get through--hopefully, in some instances--the arch.

Mr. Renwick: What would happen if you dropped the PSE examination?

Mr. Bryson: We would have to seriously consider strip search or hands-on search to protect our products and those of our customers.

Mr. Renwick: These other improvements in your security system would, in your opinion, not be adequate?

Mr. Dennis: That is correct, sir.

Mr. Renwick: Even this computerized arch?

Mr. Dennis: Yes, sir.

Mr. Bryson: It is still a metal detection and we have demonstrated that we have non-metallic forms. That is our problem.

Mr. Renwick: And did your insurers have anything to do with your instituting the PSE examination?

Mr. Bryson: Absolutely. Our Prudential insurance, as Mr. Dennis said, was cancelled for a three month period. We certainly had to beef up considerably all of our security procedures.

Mr. Renwick: Was it a condition of your insurance that you have the PSE examination?

Mr. Bryson: Yes. It was a condition of our insurance that we beefed up our security measures.

Mr. Renwick: But not necessarily the--

Mr. Bryson: That is correct.

Mr. Renwick: Did they put the condition on you that you had to have the PSE examination?

Mr. Bryson: No, they did not.

Mr. Dennis: If I may point out, just to enlighten a little bit more on your question, there are certain parts of the body that precious metals can be hidden, and you can spend a great amount of time and expense on metal detection and it will not reveal where you have hidden that piece of metal.

We have done, I feel, a great deal of research on this and of people carrying it out through metal detections, and I have gotten out on testing a tremendous amount of metal myself along with management on trying it.

To the best of my knowledge, anyway, none of these mechanisms and metallic arches and whatever have gone in without the union being consulted with first and having them agree with it.

A piece of metal like this, sir, which is one kilo--and Mr. Bryson did want to comment on the value of it and I hope I can get out of here alive today--but that little bit there that can be concealed on a person and possibly got through metal detection in a certain way is worth \$19,000.

~~Mr. Renwick: Thank you, Mr. Dennis. I can well understand, and I don't want to draw any unduly fine distinctions, that if a theft occurred in one part of your operation that you would not spread test someone...~~

J-1650 follows

Mr. Renwick: I do not want to draw unduly fine distinction. I can understand that if a theft occurred in one part of your operation that you would not go and necessarily conduct a random sample and end up with a sample from some other part, but if it occurred in one area where you felt that you had isolated the area in which the theft had occurred, is it then a random sample within that area, or is it a selective process with respect to the particular employees?

Mr. Bryson: In the event there was a loss, sir, or are you saying there is a limited population that has access? Which are you asking?

Mr. Renwick: I am just trying to get clear in my mind that in your submission to us you refer to the random selection. In the collective agreement you refer to the random selection, but you reserve the right to institute a selective sampling. When we were talking about it before, you indicated that if there was one area of the plant, naturally, you would not want a random sample out here.

I was curious about the extent to what you mean by a selective sampling. Have you got a suspect or two or three suspects and you simply say, "These are the ones we are going to do," or do you random sample within that group?

Mr. Bryson: I am sorry, sir, you are referring to our collective agreement and our ??competitor responded to it? I hope, for clarity, we randomly select people to be subjected to the PSE. We 100 per cent metal detect.

Mr. Renwick: Right. I understand that.

Mr. Bryson: Now what is your question?

Mr. Renwick: So you do not use PSE on some form of selective sampling. It is entirely random?

Mr. Bryson: I cannot say that would never happen because, if we have a specific loss in an area we can isolate when it was taken. It would not be a random selection, it would be 100 per cent subjection to the PSE.

Mr. Renwick: Of everybody in the area?

Mr. Bryson: That is correct.

Mr. Renwick: I think I understand, but you have not used it by saying, "We suspect A and we are going to sample A, B, C and D"?

Mr. Bryson: Harass them? No. If that is your question, sir, we will never get away with it, we do not intend to do it and we do not do it.

Mr. MacQuarrie: In using the PSE examination, I take it from what you said it is a combination of interrogation and voice stress analysis?

Mr. Bryson: I do not know ??.... I know it as simply ??...

Mr. MacQuarrie: All right, asking some questions and then recording, you are using a tape recorder only?

Mr. Bryson: Tape recorder, and then I am using a PSE unit in conjunction.

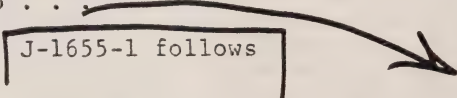
Mr. MacQuarrie: What is a PSE unit? We have been talking mainly about the polygraph in our discussions and most of the evidence that has been led before the committee deals with the polygraph and its use. Does this PSE unit that you talk of use any of the components of the polygraph, the blood pressure ??.. the electrodes?

Mr. Bryson: It does not, sir.

Mr. MacQuarrie: It is a voice stress analysis. You mentioned the use of this examination on employees implant or in connection with activities occurring during their employment. Do you use it at all in pre-employment screening or testing when you are hiring people?

Mr. Bryson: I can tell you, speaking for our company, we do not use it prior to hiring someone. We do use it during the probationary period. However, before hiring, people realize that a condition of employment at Johnson Matthey is that they sign a statement allowing us to . . .

J-1655-1 follows



~~Mr. Bryson: Before signing, people realize that a condition of employment at Johnson Matthey is that they sign a statement allowing us to.~~

Mr. MacQuarrie: As a matter of routine, do you use it then during the probationary period?

Mr. Bryson: Yes, we do, sir.

Mr. MacQuarrie: So every employee then is tested some time during the probationary period?

Mr. Bryson: That is correct.

Mr. MacQuarrie: Your business is a particularly sensitive one, and reliability of employees is, I would assume, extremely significant. What sort of pre-employment investigation do you go through? Do you just take an employee of what he puts down on an application for employment?

Mr. Bryson: No, sir, we do not. When I personally do the recruiting, I have often said to the employee, "We are going to assume that you have been in jail for larceny unless you can prove that you have not, so please tell us where you have been." When he purportedly tells us where he has been, we certainly check with the other places ??

Mr. MacQuarrie: So you are fairly careful.

Mr. Bryson: Yes, and we certainly communicate back if we find something does not add up.

Mr. MacQuarrie: One of the advantages that has been cited with respect to the use of the polygraph--and I am not particularly referring to the PSE evaluation that you people are using--is that in pre-employment screening there is a tendency to be able to identify whether a potential employee is telling the truth or not. Do you feel that could be handled in other ways?

Mr. Bryson: It is my personal experience that if an employee sees that he is required to sign a waiver allowing us to, if you will, give him a lie detection, many voluntarily say, "I am sorry. I just left some time in Kingston. I guess this is not the place for me," embarrassment is saved, and he moves on. He does not work in our sensitive business. That has been my personal experience over the last 25 years.

Mr. Chairman: Thank you, Mr. Bryson. Are there any more questions for the gentlemen?

Mr. Renwick: I think I probably have a couple of questions for the parliamentary assistant while we have our friends here, if that would be in order.

Has the ministry given any serious consideration to the specific problem when you were drafting the legislation? Obviously


Mr. Renwick

the definition "lie detector test" here appears to be broad enough to cover this PSE unit that they are speaking about. It seems to me there are some distinctions around that are applicable here, that are not necessarily applicable in the other situations that we were talking about.

Here, as I take it, using the example which is in front of us, while selective sampling is a little bit confusing, on the random sample basis you are saying that every employee is in the identical situation, that he may be picked to go through this particular ritual. I take it there is no physical obstruction of the person, no electrodes, no straps, nothing; it is a voice-operated thing which makes a recording. That seems to me to be a somewhat different situation than, as Mr. MacQuarrie said, the polygraph situation that we had been talking about yesterday and up until now.

Mr. Gillies: There are some problems in the area of PSE, and I know Colonel McQuiston yesterday did not particularly agree with this, but the largest body of evidence we can find would indicate that the psychological stress evaluator is less accurate than a standard field polygraph. I can quote you some statistics and so on, but it is generally thought that even if we accept that a polygraph in specific question types of tests under very good scientific...

1700 follows



Mr. Gillies

~~but I have generally thought that even if we accept that a polygraph in specific question types of tests under very good scientific conditions may have an accuracy rate of over 90 per cent, there are studies that would indicate that the PSE accuracy is somewhat lower.~~

I can cite to you one particular examination on the subject done at Fordham University which indicated an accuracy rate of about 76 per cent.

Mr. Renwick: On what kind of instrument?

Mr. Gillies: On the PSE. The standard field polygraph tests four different types of stress at the same time through the various electrodes and so on, the heart rate and--

Mr. Renwick: I could well understand that. This piece of equipment does not strike me as being necessarily a sophisticated piece of equipment. The purpose seems to be somewhat different to me, and I cannot isolate it in my mind as to what is involved in this.

Mr. Gillies: I share your concern. Where a polygraph is measuring through its mechanism, it is measuring four or more types of stress in the human physiology. My understanding is the PSE is just monitoring one, and that is the presence or nonpresence and degree of stress in the voice.

Mr. Renwick: Leaving the unit itself, the purpose, it seems to me to be here, is that by agreement with the union, using this particular example, all of the employees have agreed to the same condition of employment and so on and have accepted it, whether they like it or not, as a not unreasonable deterrent to the honesty of the work force. They are all subjected to the same possibility of choice for that purpose.

It is not after a person has been selected as an object of allegation of theft that you then put him in the predicament of saying, "You have got to prove your innocence in this." I am not very clear in my thinking. It seems different to me.

Mr. Gillies: I see what you are getting at, and I think if we accept the limitations of the technology that this could, in fact, be a specific area that we could look at. I would undertake to do so and report back to you on it.

Mr. Renwick: I would have been concerned if they came here and said that what they are saying is reserving the right to subject any employee on a random basis to this polygraph test, the electrode business and all of the rest of it. I am not suggesting about the scientific part, because we could argue from now till kingdom come as to whether one is 76 per cent or 98 per cent or 22 per cent. As Dr. Saxe said, you could get into an argument forever.

Mr. Bryson: I would not want to mislead the committee. We have found that, yes,?? we have been asked if we will sit down with the union. We will sit down with out employees and they will say, "We have another problem," and perhaps find out what their problems are. ?? We have a responsibility to ??

Mr. Renwick: But you do not foresee that. You are saying that the system you have at the present time--

Mr. Bryson: Seems to be working.

Mr. Renwick: Seems to be working.

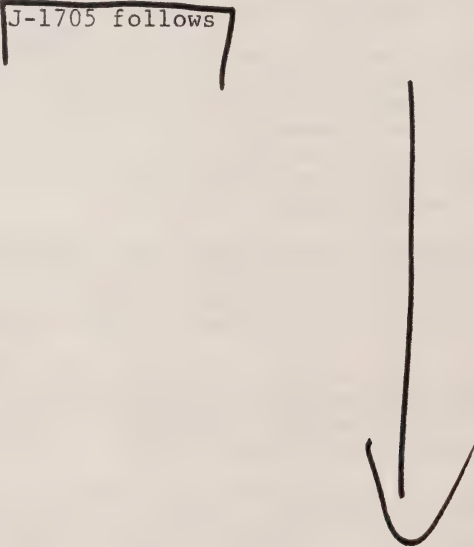
Mr. Mackenzie: Preferable to strip and search.

Mr. Renwick: And that you do not have any sensation that you have to go back to a more sophisticated version of strip and search, which is what the polygraph is. That is kind of an intrusion. I notice that you carefully have provided in there about the dignity and courtesy during the search procedure. I do not find that somehow or other as offensive.

I would find it extremely offensive if it had been a question that you could random sample a person to go through the polygraph. I think that polygraph machine is an indignity. That is my sense of it. I do not sense what you are doing is an indignity. That may be just very much a subjective judgment of mind.

Mr. Chairman: Would it be fair to say that it is one of the number of tools that they use in security matters when it comes to precious metals? That is what it seems to be to me, just one of the three or four different ways of having security.

J-1705 follows



is
Mr. Chairman

~~just one of the three or four different ways of having security~~
Would that be a fair assumption?

Mr. Renwick: I suppose I am fending around, but what I am saying is that the presentation today does not seem to me to be as unreasonable as the other. Part of it may be subjective but I think there is are some really valid distinctions around there.

It may be that we will want to look at some method, not by granting that particular industry a carte blanche to use the polygraph, but we may be wanting to say, "You have come before us and your arrangements with your employees spelled out in this type of agreement," using the one company and so on, the way in which you have done it is not an unreasonable one and it is not our intention to intrude on that.

How you isolate the exception and also do not say we have given them a carte blanche to move tomorrow to the kind of machine which to a number of us and which prompted the ministry, undoubtedly--has a certain sense of intrusion which is not present there.

I think it is something that we would have to look at, but I do not find the submission today unreasonable. That is not because there is a collective agreement with one of the major unions that supports the New Democratic Party.

Mr. Chairman: Supposedly.

Mr. Stevenson: Basically, my comment was much along the lines that Mr. Renwick has already made. I think quite clearly these companies have a security problem. It is something they obviously have to have control over and they have to certainly have means of maintaining a strong security system.

Mr. Gillies' response on the accuracy, really, as long as the thing has some moderate accuracy, I really do not think it matters very much whether it is 76 per cent or 82 per cent or 91 per cent or whatever it is. That seems inconsequential to me.

The thing is, they have a system that is working. It seems to me if I were a worker there, I would be much happier with what is outlined in the collective agreement than what some of the other alternatives might be. As Mr. Renwick has said, we really have to give this some very serious consideration.

Mr. Gillies: From the ministry point of view, we certainly will undertake to look at this. I think there are some issues. Obviously, this is of particular import in an industry like yours where, as you have so ably demonstrated, a loss of a comparatively small piece of inventory can be so significant.

We accept the premise that ethically a theft is a theft, but if there is a special problem here we will certainly, from our point of view, look at it and report back to try to aid the committee in its deliberations.

Mr. Renwick: If you can help us in any way, we would appreciate it.

Mr. Bryson: We are at your disposal.

Mr. Chairman: Thank you, Mr. Bryson. Thank you all, gentlemen, for appearing.


I believe the next group is Mr. Thorp. I do not know whether you have a written presentation or if it will be oral.

Mr. Thorp: No, I do not.

Mr. Chairman and committee, first, before I begin I would like to introduce you to Jim McInnes, who is an employee of Englehard Industries. Today our purpose here is to address you as an employer, along with Johnson Matthey Ltd. and the work that Peter Bryson has done on our presentation, as an employer and an employee who were before you today.

I would like to make some very sincere statements about our operation and, in particular, some of the questions that I have heard in the last two days that may clarify how our industry tries to function within the realm of respectability-- • • •

J-1710 follows



~~Mr. Thorp~~

~~These statements about our operation and in particular some of the questions I have heard the last two days that may clarify how our industry tries to function within the realm of respectability and understanding with our employees and their relations with us.~~

I would like to start off by mentioning that the PSE program that was described to you by Mr. Bryson is the one in fact that Engelhard Industries is presently using and is using in three particular areas. One, as a tool for employment, whether pre-employment or after the person has been confirmed. Second, we would use it as a tool for prevention. Third, as an investigative tool.

I would like to start off by also saying that the PSE program is offered to every employee within our organization. We do not discriminate between worker, representative, union or management or supervisory. In any of those cases it is all offered on an equal basis and on a voluntary one.

I have never had an applicant come before me and refuse to take a PSE. I consider that a reflection on our responsibility to explain why we would go to those lengths in employing people. We spend a lot of time explaining to the individual what our responsibility is. When we take metal into our building, it is often not our metal and we have a responsibility to our customers. We explain in some detail what our business is.

After explaining that, I have never had an applicant sit before me and say, "I refuse to take such a test or submit to a PSE."

Second, the information that I get back from a PSE, and we differ from Johnson Matthey in as much as we send a person to an organization to have the PSE conducted or have that person come into the building for us, the information contained coming back from the PSE, we have never denied employment based solely on test information and I am saying the test data supplied by the equipment, we have never denied anyone employment from that.

I would like to explain that, because if we had a person, a potential candidate or an employee go down and take a PSE who made a blatant statement that that person in the eye of society had created or caused a criminal act, we obviously would not offer that person employment. But if we were in a position where the PSE operator phoned us and said, "I have a concern about a particular area of the test where I think this person might be lying," (a) I have never had that happen because I consider the credibility of the operator, that has never been proposed to us and, (b) if it was, I would have to discount it because I do not consider that valid.

What I am looking for is, if the person makes an open statement with regard to his past credibility, criminal acts, etc., we would consider it, but we do not consider it solely that the person might have lied or that there is concern.

Mr. Thorp

In the case of employees who are with us now, and when an employee is confronted if we have a loss of material, and only in extreme situations, if we can ask them to take a PSE, if that employees says, "I am sorry but I feel I am above and beyond that and I do not have to subject myself to a PSE," we thank the person and that is the end of it. We have never had an employee in our organization every dismissed, suspended, verbalized, disciplines, although I hate to use that word, for every refusing to take a PSE test.


In the case of prevention, the two areas that we concern ourselves with namely is security, because they are charged with the overall security of the building, and second, our vault organization, which is their responsibility to retain the gold, to handle it, to issue it, to return it, to accurately validate inventories.

Mr. McInnes has come with me today as an employee and obviously I have had some choice in who I bring with me. I could have brought anyone from our vault organization as a person to answer any questions as an employee of Engelhard Industries.

One of the other questions that I think has been briefly touched on is what benefits could there possibly be for an employee. I would like to explain just briefly two examples where the PSE program has been a benefit to the employees.

~~In the first case a search of the plant was conducted after a loss was~~

J-1715-1 follows



Mr. Thorp

~~explain just briefly two examples of where the PSE program has been a benefit to our employees.~~ In the first case, a search of the plant was conducted after a loss was recorded. During that search we found, concealed amongst one person's personal possessions, five gold coins. The kind of coins that I am talking about we currently produce blanks for the benefit of the Canadian mint. Amongst this man's possessions were five 24-carat one-ounce coins concealed amongst his personal possessions within the ???. That was a very serious situation. They were located about four or five o'clock in the morning.

When the employee came in, the first thing we did is we consulted with the union. We asked the union president to come in; we discussed the situation with him. Secondly, when the employee arrived at the building we explained the situation to him, which created great discomfort, I am sure you can realize, for him. After a great length of talking to him, with the union president available, and talking with security, we were of the general opinion that he had nothing to do with removing the coins from that area or attempting to conceal them. Then we were left with the problem of how do we prove it to other people, because obviously as long as I can sit there and say, "I am sure the man is innocent," somebody is not going to believe me--whether it be management, whether it be his fellow worker.

We offered the gentleman the PSE and he jumped at the chance. He said, "I know management believes in its use and if that is the case, I believe in it also." He said, "If you have offered it to me, I greatly accept it." He took the PSE test and, according to the operator, came through it with flying colours. As far as he was concerned, this man had had nothing to do with concealing those coins.

Then we were left with the problem. The person who conducted the PSE is a person who has been in, say, the employment or the consulting area for management for a number of years. Management could cook anything up for the benefit of management. We then asked the PSE operator to supply us with the name of an independent polygraphist, who came in, conducted a similar test on a polygraph machine with that employee at his request and agreement and along with the agreement of the union representative, and he came through that with flying colours.

When we were finished, he received a letter from the president of our company thanking him for his cooperation, his dedication, and his sincere effort in trying to explain the loss of that material.

The second area was a person who, for whatever reason, unknown to me still today, took it upon themselves to enter a high security area, very sensitive area, but for some reason remove an object from a desk in which they had no responsibility being near or around. This was overseen by two people and immediately reported to our security department. Obviously, the intent in explaining that situation was obvious to us, that this person had

Mr. Thorp

intentionally gone into a high security area, attempted to remove something from a desk or did, unknowing to us, and for whatever reason. We confronted the person and they could not even remember the incident. They could not even remember being in the area, which left us with either two possibilities: one, the person was lying and knew exactly what they were doing in the area; or, two, was so naive to misunderstand or even think that that area had any concern for her employment or would have any effect on her or his employment.

This person took the PSE; it was something that was readily agreeable upon. Again the statement was, "If management believes in it, so do I, and I am more than prepared to take it."--took the PSE and came through it with flying colours. In that incident, she suddenly remembered when she was taking the PSE why and how she had come to be in that area. She could not remember when we asked her, but taking the PSE, it suddenly came to her mind, she said, "Now I remember. I was in that area one night, I was going through the particular department. I know I should not have been there, but I was cutting across the department, and I had to have a pencil, because I was thinking of something. I walked in and I opened the drawer and I took out a pencil." We did not know to that date what she had taken out of the desk.

That is the kind of situations from which our employees have been readily cooperative and I would go back to the first incident in which the man had coins found amongst his possessions, ~~that if~~

J-1720 Follows



(Mr. Thorp)

~~...The other night, I was going through the particular department. I know I should not have been there, but I was cutting across the department. I had to have a pencil because I was thinking of something. I walked in, opened a drawer and took out a pencil. We did not know until that date what she had taken out of the desk.~~

~~This is the kind of situation in which our employees have been readily cooperative. I can go back to the first incident in which the man had going found among his possessions. This could have been another organization. The results could have been that he would have been taken from the plant, charged, possibly had his house and his neighbourhood disrupted, and had further search of other material. It could have been a great discomfort to him and us, an embarrassment to everybody involved. The gentleman, and both of the people involved with us, are still employed today, thankfully. I think they are excellent people and they deserve a lot of praise for what they did.~~

Our operation and what we try to do is do it on a nondiscriminatory basis, whether it is the PSE or a metal detector. It surprises people when you tell them that your president, your vice-president and your directors go through the same search procedure, the same metal detection procedure, as anybody in the operation.

I can go into the plant as a part of management--and I never physically enter the area where gold, silver, platinum or palladium is held--yet when I leave that building, I go through the same procedure as the worker who was working on it. We have reasons for this.

Everybody is treated equally the same. In our company, I believe at last count we had something like 28 nations working within our building. We are not a large company; we have less than 200 people. However, a lot of the people originally came from Toronto and it has been our responsibility over the last number of years--for many years--to protect their rights and work as hard as we possibly can on the rights of the individual and on the dignity of the individual.

When we consider such things as the alternatives--strip searching--it is obvious that some companies go to great lengths to find out about the past of an employee. An example is calling a former employer. I am sure, if anyone here today is an employer, they will understand and appreciate that employers are becoming more and more reluctant to give out information and specific details about an employee's past performance with them.

In fact, I have had cases where someone has sat before me and told me they had an excellent record. I have called the employer and he has said: "Yes, I can agree with that, an excellent record, highly recommend the person." The person went for a PSE test. I was told later that the man had openly stated he had committed a number of criminal acts against his previous

(Mr. Thorp)

employer. I contacted the previous employer and the previous employer said: "Well, I really did not want to mention that. It is not our say that he should be denied employment with your organization."

Employers today, because of human rights and because of legislation and rightfully so, are becoming more and more reluctant to talk about specific details with other organizations. On a one-to-one basis where I know the personnel manager or the industrial relations director personally, that person may be more open to me and more honest. However, in the case of a person who is unknown to me, they may not want to be put in the position of dealing with specifics, especially if the employee was discharged and they came to an agreement upon termination.

This is a very difficult situation. What I am trying to explain is that there are a number of normal procedures which, in the precious metal industry, are not sufficient for us. There has to be another means.

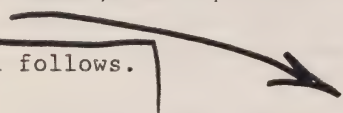
As Mr. Bryson explained, in the refining of metals--and one of the details I would like to clarify is that when a metal is assayed, this means that an estimated amount is put down on paper. One of the things which I will say is that we can receive metal into our building with an assay of let us say 12.5 per cent gold. We could lose metal from that and never know it. The reason for this is that if we go back to the customer and say: "Well, we found 12.44 per cent gold," he probably would not argue too much. However, if that ??watt had been 100,000 pounds of material, this difference could be very, very costly.

The customer is relying on us because we have the credibility within the industry to state what we feel the value of that precious metal is. He must respect this. If he does not, he will go to a competitor. We could lose the business permanently, which means it drastically affects our labour force.

These are about all my comments. However, I would like to welcome any questions myself, or Mr. McInnes, as an employee of Engelhard Industries, would like to bring forth.

Mr. Mitchell: I am quite--I do not know the word to use--but I am quite impressed that an employee would choose to come...

J-1725-1 follows.



~~Mr. McInnes, as an employee of Engelhard Industries, would like to bring forth.~~

Mr. Mitchell: ~~do not know the word to use, but I am quite impressed that an employee would choose to come.~~ I guess my question is really directed to you. How is that you came?

Mr. McInnes: I have been the vault supervisor for my particular area at the refinery since 1978. For the last five years we have participated as a vault member in a sensitive area. On regular basis, once every three months, again, a random selection of the particular--our vault staff may vary from five people to 20 people, depending on the flux of the business.

In a productive year we may be at 20 people with 10 people who are considered green. Those are the areas where my concern comes in. I do not know the fellow. I have not worked with him any length of time. I do not have any personal feel for the fellow.

The area that concerns me is that if I have belief in a company and I see the metal, I can see the stupidity of certain individuals, just because of lack of neatness, etc., where it can affect the quantity of metal that you are dealing with. If I am asked to take a test, in my business I have no objections at all. It is an area that is measured in a vast amount of dollars that you quickly lose the value for. You treat it like apples and pears.

When you see a vast amount of metal, that takes some acquiring. To the person who is on trial for three months, there is a great temptation. In fact, you could get to the point where you just do not want to see particular incidents. Nobody wants to, obviously, rat. I have in the last five years acquired a lot of individuals whom I am very close with. When it comes to a business dollar, if he is going to steal, I see no reason why the company cannot ask him to take a test that I am willing to take.

You could get an individual opinion of it with various people. As an employee of Engelhard Industries, they are asking me to take a test that I find not unreasonable.

Mr. Mitchell: How did you come to be here today? Were you asked if you would mind participating in this discussion? How did it come about?

Mr. McInnes: Mr. Thorp asked me if I would be willing to attend. I had been there the longest in that particular area.

Mr. Mitchell: You are the supervisor of the vault area, which is probably one of the most critical areas of it.

Mr. McInnes: Yes.

Mr. Thorp: Excuse me, maybe I could further explain that. Mr. McInnes, along with another gentleman, were both asked if one of them would like to attend. The other gentleman, unfortunately, could not attend because of family illness.

Mr. Chairman: Are there any further questions?

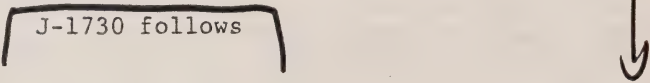
Mr. Renwick: I have a little bit of trouble, Mr. Thorp, with the scenario you spelled out. I appreciate and admire the loyalty and sense of integrity about your company's operations involved in it. You described the way in which it handled the situation. I am thinking of the first situation.

I think the area that concerns me about that approach to it is the unanswered question. What would have been the situation if the person had said, "No, I will not take the test, I will not take the polygraph" and had said so simply for perfectly legitimate reasons? We are talking about a person who is innocent.

Mr. Thorp: It is conceivable that with those two people involved that both those situations were clear situations in which any person hearing the information would have said that obviously they have been caught supposedly red-handed, either in attempting to hide something or, unfortunately, take something.

It is conceivable that it could have resulted in dismissal. The reason that I really cannot give you any particular opinion on that is because out of 180 people, the co-operation that we get--

J-1730 follows



(Mr. Thorp)

~~100 people who are so concerned~~ from our employees, who understand the vital need for security. It is one of the few things that can keep us in business and maintain our operation, our credibility with customers and, certainly, with the employees.

Therefore, I do not have an answer for you. As yet, I have not run across that.

I have run across, in a particular investigation, a situation where an employee said to us, "I am sorry, but I am not taking the PSE." We said, "Thank you very much. If you change your mind, we will be more than happy to explain it to you."

When a person is offered the PSE, we do not go just that far. We will, on request, supply the employee and/or their bargaining agent with a copy of all questions to be answered prior to going into a PSE. Second, if that person would like to have a representative present when the test is conducted, they can do so. That is their choice.

We do not just offer it. We explain the details of it. If the person still chooses not to take it, we thank them and that is the end of it. We have employees in that position right now.

Mr. Renwick: I am not knowledgeable about these things, but presumably in a firm such as yours you would have an employee personnel file on each employee.

Mr. Thorp: That is correct.

Mr. Renwick: Would that notation go into the file?

Mr. Thorp: Let me explain both situations. First, the two people who agreed to take the PSE to clear themselves, all the information regarding that investigation was destroyed and the employee was given a letter personally from the president. The reason we did that is so that the employee, at any time in that person's future, will never be questioned again about that particular incident. We want nothing on the file making reference to the particular incident.

Where the employee says, "I refuse to take it," that is not shown on the file. We do not retain that information. We do not want people making suggestions, references or inferring anything with regard to that person's credibility. If the only thing we rely on is the PSE, which is only one tool in our organization, if we had to rely on that solely, we would be would be seriously at fault. Our intention is not to mislead anybody now or people in the future.

Mr. Renwick: I think the point which is exercising the committee is after the PSE, the point where the question of the polygraph came in, which is a different instrument with---??

Mr. Gillies: Supplementary to Mr. Renwick's point, I am not quite clear, Mr. Thorp, on whether or not you are using the PSE as a screening tool.

Mr. Thorp: Yes, we do.

Mr. Gillies: You do, for prospective employees.

Mr. Thorp: Yes, either before or sometimes afterwards. That is basically at random. It may be an hourly or bargaining unit employee; it may be a management employee. In both those cases we have agreed to hire a person and had the PSE done after they were actually actively at work.

What we try to do is conduct that prior to offering employment. In many cases I have offered employment first and done the PSE afterwards.

Mr. Gillies: The same principle you are using with existing employees would apply to prospective employees? You would never deny employment on the sole basis of the PSE test?

Mr. Thorp: That is correct. I can honestly state right now that we have never denied employment based on that solely.

Mr. Chairman: Are there any further questions by any of the committee to Mr. Thorp? If not, Mr. Thorp, on behalf of the committee we thank you for being here and giving us your presentation. Thank you again for taking the time out to join Mr. Thorp, Mr. McInnes.

The committee adjourned at 5:34 p.m.



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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

EMPLOYMENT STANDARDS AMENDMENT ACT

WEDNESDAY, NOVEMBER 9, 1983

Uncorrected draft copy



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Kolyn, A. (Lakeshore PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
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Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)
Taylor, J. A. (Prince Edward-Lennox PC)

Substitution:

Piché, R. L. (Cochrane North PC) for Mr. Mitchell

Clerk: White, G.

From the Ministry of the Solicitor General:

Ritchie, J. M., Director, Legal Services Branch

Witnesses:

Frechette, Corporal W., Certified Forensic Polygraphist, Ontario
Provincial Police

Nicholls, Sergeant G., Member, Legislation Committee, Canadian
Association of Police Polygraphists; Sergeant, Niagara
Regional Police Force

Welsh, Chief T., Chairman, Legislation Committee, Ontario
Association of Chiefs of Police; Chief, Ottawa Police

From the Peel Regional Police:

King, Superintendent B.

Knox, Detective D.

Thomas, Detective Sergeant A.

From Leach and Garner Canada Ltd.:

Bechera, W., Sweeps Room Melter

Pankew, R., Chief of Security and Personnel

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, November 9, 1983

The committee met at 10:21 a.m. in room 151.

EMPLOYMENT STANDARDS AMENDMENT ACT

Mr. Chairman: I see a quorum. The meeting will come to order.

The first delegation on the list is Mr. Ray Kerr of Harmony Diamonds. Is he present? If not, we will move to John M. Ritchie, QC, from the Ministry of the Solicitor General. As the committee members are aware, we asked the Solicitor General (Mr. G. W. Taylor) to send a representative to help us with the deliberations on this bill. Mr. Ritchie, do you have a written presentation? Would you please introduce yourself and your colleague?

Mr. Ritchie: Mr. Chairman, my name is John Ritchie. I am the director of legal services with the Ministry of the Solicitor General. With me is Corporal Wayne Frechette of the Ontario Provincial Police. Corporal Frechette is a certified forensic polygraphist.

Interjection.

Mr. Ritchie: I had to weigh the word carefully, sir. We have a brief presentation on the use of the polygraph by police. The polygraph is used by eight police forces in Ontario, and I will name them: the Ontario Provincial Police, Peel Regional Police, Waterloo Regional Police, Halton Regional Police, Niagara Regional Police, Metropolitan Toronto Police, Durham Regional Police and the Ottawa Police force. There are approximately 10 members of Ontario police forces that are qualified polygraph operators.

The Ontario Provincial Police conduct polygraph tests when requested by municipal police forces that do not have trained polygraph operators amongst their members. The OPP have two qualified operators and approximately 40 per cent of the tests they conduct are for municipal police forces.

The OPP conducts a total of 150 to 160 polygraph tests a year. Police officers, and this applies to all Ontario, who conduct polygraph tests are required to qualify as certified forensic polygraphists. This involves a 14-week polygraph training course at the Canadian Police College in Ottawa, together with two weeks on-the-job training. The police officer then goes through an internship of six months to one year before being certified.

The work of a police polygraphist is very demanding and rigorous. The questions that are put to the subject are, of course, vitally important, as is the proper interpretation of the results of the test. Police polygraphists tend to move to other positions in the police force after five years or so.

The polygraph is the only type of lie detector used by police. It is normally used for the most serious crimes, such as murder, rape, holdup and major theft. It is used most often in connection with murders. The polygraph is used by police as an investigative aid. The polygraph has established its usefulness in determining who is a suspect and who is not a suspect.

I should mention at this point that in 65 per cent of the tests conducted by police the suspect is cleared. In other words, the suspect is found to have been telling the truth. On the other 35 per cent, the police will conclude they are on the right track and pursue the investigation with that particular suspect in mind.

The results of polygraph tests are not used as evidence in the prosecution of charges. When a case goes to court, the charge must be proven beyond a reasonable doubt on the basis of other evidence. Polygraph testing is simply an investigative aid to the police that may help in pointing the investigation in a particular direction.

Police polygraph tests are conducted strictly on a voluntary basis. The subject is asked to sign a form prior to the test indicating he is undergoing the test voluntarily. At the end of the test, the subject is again asked to sign the claim form indicating that he was not threatened or mistreated and that he remained through the test of his own free will.

I find that it is not the practice to videotape the polygraph test in all cases. Normally it is done on request of defence counsel and, of course, with the knowledge of the subject of the test.

The police believe that polygraph tests have an accuracy rate, or reliability rate, of approximately 90 per cent. This figure is based on the numerous studies that have been conducted in the past ten years or so, together with their own experience as police polygraphists. The accuracy rate is important since, as I mentioned a minute ago, the subject is exonerated in two thirds of the tests conducted by police.

There have been cases where the subject of a polygraph test has later confessed to the crime and then argued in court that he did not take the test voluntarily. If a court were to find that the polygraph test was not voluntary and the confession was influenced by the test, then the court might not admit the confession in evidence. I can tell you, however, that defence counsel have not been successful in arguing that police polygraph tests were not undertaken voluntarily. This fact supports our belief that, in conducting polygraph tests, police have been acting entirely properly.

The police do not use the polygraph to "fish" randomly for suspects. The police have a particular offence under investigation and they are intimately familiar with the details of the crime. When conducting a polygraph test on a particular subject, therefore, the police are in a position to ask some very specific

questions that are designed to "weed out" an innocent person and point to a person who is possibly guilty.

This is in contrast to a situation where a number of persons are routinely tested in the hope that something will be learned. The police do not take that approach, and that fact, together with the training they receive, probably accounts for the 90 per cent accuracy rate that police attribute to polygraph testing.

I will close by saying that the Solicitor General (Mr. G. W. Taylor) strongly supports the right of police to conduct polygraph tests in the investigation of offences. Polygraph testing has proved to be a useful and effective aid to police investigations.

I hope my comments have been of assistance to the committee and thank you very much for the invitation to appear today.

Mr. Chairman: Thank you, Mr. Ritchie. Mr. Mancini, do you have a few questions?

Mr. Mancini: Mr. Ritchie, if I am correct, the present legislation introduced by the Minister of Labour (Mr. Ramsay) will not in any way impede Ontario police forces from conducting tests as they have in the past. Is that correct?

Mr. Ritchie: That is correct. The legislation, I think for the sake of clarification more than anything else, exempts the use of polygraphs by police in the investigation of offences.

Mr. Mancini: Could you please inform the committee how you are able to tell us these tests are 90 per cent accurate, and by what scale? What have you used as a basis to form this opinion and to attach this number to it?

Mr. Ritchie: Yes. This opinion, as I stated, is really the opinion of the police polygraphists in Ontario. I believe there are ten scattered among eight police forces. They formed that opinion as a result, first, of their own experience, and second, of the various studies that have been done and that they are familiar with.

I was given a list at one point of some 59 studies, so there have been numerous people who have looked into the polygraph. As I said, the police based their opinion in part on the literature available.

Mr. Mancini: Is that your answer?

Mr. Ritchie: Yes, sir.

10:30 a.m.

Mr. Mancini: There is no standard you use. It is just the opinion of ten policemen in Ontario.

Mr. Ritchie: That is correct, based on the studies they are familiar with and their own practical experience in the field.

Mr. Mancini: I am interested in these studies you mention. Are these research documents that have been presented or prepared by different universities, or special interest groups? Who has prepared these documents these ten policemen have based their figures on?

Mr. Ritchie: I believe you are right and we are talking about university groups and so on. Perhaps Corporal Frechette could be a little more specific in the way of a response.

Corporal Frechette: As to the available literature, I can provide you with a Bibliography on validity and reliability studies. The consensus of that literature is that the polygraph technique is valid and accurate in the neighbourhood of 90 per cent of the time.

Mr. Mancini: That is my problem. We are told these documents are available, and I believe you, but we are not told as to how they come to this particular figure. There must be some technique, some mechanism other than an opinion, because two of those policeman might say, "Well, we think the accuracy is 85 per cent." The other eight will say, "Well, no, We think it is 96 per cent." So what do we get? A 90 per cent average?

Corporal Frechette: Ninety per cent probably would represent a consensus on average, because the studies range probably from 85 to 95 to 96.2 per cent and so on.

Mr. Mancini: So it is accurate to say there are some people in the business per se who believe the accuracy rate is less than 90 per cent.

Corporal Frechette: Probably.

Mr. Mancini: Why have you been unable to convince the Attorney General or people involved in the courts that polygraph tests should be admitted as evidence?

Corporal Frechette: You have put the question that we have been unable to convince them. Speaking for the Ontario Provincial Police, we have never made an effort to convince them that it should be admitted as evidence in court. Our use of it really does not demand that we make that effort. We use it as an investigative aid. It is not the kind of thing where I would go into court as an investigator and want to say, necessarily, that John Doe failed a polygraph test, therefore he--

Mr. Mancini: Why would you not you want to say that if you believe in what you are doing?

Corporal Frechette: Because if you take the consensus of the research, which is from 85 to 95 per cent, there is admittedly a margin of error, and I personally would not want to be in a position of being wrong on a serious case, which is basically what we are talking about, murders, etc.

Mr. Mancini: You bring up a very good point when you say

a significant margin of error may take place. When you do these polygraph tests are the judges made aware of these results? Are they asked if they would like to know this information? After you do your tests--and you have already admitted the margin of error to be less than 90 per cent--who is given the information after it is documented? You give it to the defence lawyer, of course.

Corporal Frechette: Certainly.

Mr. Mancini: And you give it to the crown attorney who would be prosecuting?

Corporal Frechette: Yes. Although--

Mr. Mancini: I see. I am sorry for interrupting.

Corporal Frechette: You asked about the court being made aware of it. In cases where the individual is cleared of suspicion by means of the polygraph examination, court becomes a nonissue. It does not go to court. That is probably the purpose of us doing the polygraph examination in the first place, to eliminate the man as a suspect in that given crime.

Mr. Ritchie: May I add a comment. Even in the case where the person was a suspect I do not think the evidence of the polygraph test is going to be brought forward in the court. It may be given to defence counsel, but it is not going to be tendered as evidence.

Mr. Mancini: But it is general information that is known.

Mr. Ritchie: It is background information. It is an event that took place at some point in the police investigation. They are prepared to make that information available to the defence counsel, but it is not part of their case in court. The case has to be proven on the basis of other evidence.

Mr. Mancini: Let me disagree with you for just a moment. If it was not important, the police would not be wasting their time doing it.

Mr. Ritchie: I would make a distinction. It is important to the investigation, but at the stage where the crown is trying to prove an offence in court, it becomes irrelevant, certainly as far as the crown's case is concerned.

Mr. Mancini: Just two more questions, as I see other members of the committee want to ask questions also. Could I just have a couple of opinions? That is basically what we are talking about, opinions.

Corporal Frechette, what do you think of Bill 68? Not because you are with the police department and are or were involved in activities you are not involved in now, investigations and things like that; but what is your opinion of Bill 68?

Corporal Frechette: Are you asking for my personal opinion?

Mr. Mancini: Yes. As a policeman, as a person with the OPP, as a person who has experience with polygraph tests.

Corporal Frechette: As an individual, as a taxpayer, as a member of the force or as a police officer?

Pre-employment screening is something I have no experience in. My understanding of it is that, obviously, companies may wish to examine suspect employees and this sort of thing. I have no personal objection to that, provided it is voluntary and provided that if the individual should decline, it does not mean he loses his job. It is an investigative procedure.

Mr. Mancini: And what would be your opinion as a policeman, in so far as using polygraph tests to investigate individuals who may be thought of as having committed a theft against a particular company or as having committed some crime or something of that nature against the employer? That is really the basic crux of the bill.

Corporal Frechette: I missed your question there, sir. What are you asking?

Mr. Mancini: What is your opinion as a policeman, as a person with experience in the use of polygraph testing, as to whether employers should have the right to use polygraph testing and ask their employees to take polygraph tests when they may be suspected of committing theft or some crime against the employer?

Corporal Frechette: My personal view is that the employer should have the right to protect his interests. As far as asking an employee who is a suspect to take a polygraph examination is concerned, it is done routinely in the criminal investigation context.

Mr. Mancini: That is fine.

Mr. Mackenzie: Why would some of the major forces in the province not use the polygraph? Hamilton is an example. I notice you listed the eight or 10 forces that do make use of it.

Mr. Ritchie: It is an expensive operation, sending an officer away for a 14-week course in Ottawa, followed by a year of internship. That one officer is at least tied up on this work, so it is an expense to the police force. If they can get the service as they need it from somewhere else, like the OPP, I guess some forces have been content to proceed on that basis.

Mr. Mackenzie: Would it also possibly imply less of a reliance or belief in the use of it? When you have major forces, where one man is involved, the training programs they go through in my own municipality are fairly expensive. I just wonder why Hamilton and some other major cities would not have it.

Mr. Ritchie: The ministry has not canvassed the police forces, but the general impression we have been getting is that the police community as a whole considers the polygraph to be very useful and effective on investigations; we have not heard dissenters. So I would only put it down to the cost, and possibly they have less need if they are able to prevail upon surrounding police forces as the need arises.

10:40 a.m.

Mr. Mackenzie: Why in your brief do you call it a "lie detector," as you do on the second page? We have had a fair amount of evidence before the committee that the polygraph cannot detect lies, that it can detect only a range of or change in the emotions of people and that it is wrong to call it a lie detector; yet I notice your brief calls it a "lie detector."

Mr. Ritchie: That is probably my ignorance. I did miss the early part of the proceedings. I put it in quotes because I knew it was a bad word to use. I did not know what the generic term was. I wanted to catch the whole group and point out that the only type of machine or instrument or device that the police use is the polygraph. I meant no particular slur on any other type of instrument or any suggestion that it is infallible; we would never contend that. We hope it simply will point the police investigation in the right direction.

Mr. Mackenzie: I think Dr. Saxe and some others clearly indicated that it was not and could not be called a lie detector. That is why I wondered just why you had used this wording in the brief.

Mr. Ritchie: Possibly I picked it up from the newspapers.

Mr. Mackenzie: The accuracy is also in some question. We had some evidence that even a person's fear of the test could trigger some of the responses that you get on the test, a person who might be innocent. You talk about it clearing 65 per cent. Assuming a 90 per cent accuracy rate--and that seemed to be the medium that most people agreed on; there were figures from much lower than 85 to as high as 96; I do not think anybody went any higher than that in the various testimony that has been before us--but if we assume 90 per cent, then you could be clearing a number of people as well in the two thirds you do not proceed further with, because there is clearly an accuracy range. This, coupled with the fact that it is not the major evidence in court, is why I really wonder why you would use it as one of the major tools.

Mr. Ritchie: Again, the police experience has been that even though it is not infallible and even though there is a margin for error and, as you suggest, it may even lead them away from a person who should be a suspect, nevertheless, overall experience has been that it has helped to focus investigations in the right direction; it has put them on to people whom they should be on to and directed them away from people they should not be on to.

That is just the overall experience. As I say, they have

found the machine to be effective for that purpose; I am not arguing for any other purpose. Just for the purpose of giving a police investigation some direction they have found it to be effective and useful.

Mr. Mackenzie: This may not be a totally fair question to you, but I notice that the final paragraph in your brief indicates that the Solicitor General strongly supports the right of police to conduct polygraph tests. Some of us, at least, are led to believe, and there have been some statements, that one of the strong proponents of this government bill has been the Attorney General (Mr. McMurtry), who believes this legislation should be there. Does that indicate any difference, as far as you know, between the Solicitor General and the Attorney General in their view of this legislation?

Interjection.

Mr. Ritchie: No, I am intimately familiar; I can answer that question. No, there is no division whatsoever between the Attorney General's view and the Solicitor General's view--and the Minister of Labour's (Mr. Ramsay) view, for that matter. They are all in support of the bill, with the exemption for police investigations. I have seen letters and documentation on that point.

Mr. Mackenzie: The Minister of Labour has gone so far as to tell me the bill will go through with no changes. I am beginning to doubt that already; however, that was earlier in the game, I might say.

Let me ask you, do you not find the exemption for the police to be a bit of a double standard if we have the Attorney General suggesting this legislation should be there, if you admit yourself there is an accuracy problem? I am not going to quote the numbers that have been used a number of times, but we certainly have the ministry's own documents pointing out the number of people who could either be guilty or not guilty and escape detection with this piece of equipment. They are asking that it be outlawed in screening.

This is, I stress once again, a government bill for employment purposes; yet we have the one exemption. We have this less than totally accurate piece of equipment that should remain for police investigations. I find a bit of a double standard there in what is supposedly a strong position of the Attorney General and what you are requesting be allowed to stay in the bill.

Mr. Ritchie: I would have to take issue with the conclusion there is a double standard. I would put it on the basis that we are talking about two different things. We are comparing apples and oranges. I would make three points in support of police use of the polygraph in investigations.

First, all police have taken a rigorous and detailed training in the use of the polygraph. I am obviously contrasting this to the civilian private sector. I am arguing, first, that all

police have taken very extensive training in the use of the machine.

Second, we have to realize that we are comparing two different situations that involve different testing techniques. It is one thing to say I am hiring a person and ask him if he has ever stolen anything. That is a question in the air. By contrast, we have the police with, say, a murder investigation under way, knowing all the details of the crime and putting some very specific and carefully concocted questions to a subject.

Third, I make a distinction on the basis of the use to which the results of the test are put. With the civilian situation, I guess you have indicated the person may be fired or whatever. In the police context we are talking about use of the test result to give the investigation some direction, either to steer it away from or steer it towards a particular suspect.

There is a great distinction to be made between the two situations. Given those different factors, we really do not have a double standard. We are just comparing two different things.

Mr. Mackenzie: Do you feel we could be assured that the handlers of the equipment would act in a uniform way amongst the various forces that are using them? If I can use a comparison, my experience in labour matters is that most of the forces you have listed here are no problem where we have a rather serious confrontation or strike situation in a labour dispute, but in at least one or two of them, I know, from personal experience, it is the last place I want to be involved.

I just wonder whether the attitudes can be slightly different in slightly different jurisdictions and whether that, in itself, could influence the way the test was given or the kind of things that were done in terms of the testing of a suspect.

Mr. Ritchie: That is an extremely difficult question for me to answer. Quite frankly, from what little experience I have had with police polygraphists, I would regard Corporal Frechette as a carbon copy of his colleagues, all very professional and expert both as machine operators and as policemen. I do not think there would be any distinction between police forces. They approach it as a police investigation. I have no reason to believe there would be any peculiar attitude in any particular force when it comes to this.

10:50 a.m.

It does not really gain them anything to conduct a biased test, for example. The result is simply to help the officers who are doing the investigation. It is not going to be the polygraph operator who is conducting, say, the murder investigation. He is trying to help his fellow officers. If he gives them a bum steer, if I may use the words, that is not furthering the investigation and, of course, he is not furthering his own career.

Mr. Mackenzie: I have never been sure of the reasons or standards, but certainly there is a difference in approach to

specific situations by some forces against other forces.

Mr. Ritchie: Corporal Frechette, would you like to comment?

Corporal Frechette: I can only speak on behalf of the force I represent, the OPP. In terms of our polygraph in relation to whom we test, the testing methodology and so on, it has withstood the scrutiny of the courts on more than one occasion--fairly intense scrutiny, I might add. Thus far, they have no quarrel with how we do our business.

Mr. MacQuarrie: Mr. Ritchie, from what you and Corporal Frechette have said, may I synthesize your comments by saying that in the hands of a qualified operator, the police, the OPP in particular, and the Solicitor General consider the polygraph to be a valued investigative tool?

Mr. Ritchie: That is a very accurate summary.

Mr. MacQuarrie: How long has the OPP been using the polygraph?

Mr. Ritchie: We have been operational since July 1980, a little over three years.

Mr. MacQuarrie: In that time you have been conducting an average of 150 to 160 examinations a year?

Mr. Ritchie: On the average, between two examiners.

Mr. MacQuarrie: So you have some body of experience on which you base your reliability figures.

Mr. Ritchie: I think so.

Mr. MacQuarrie: Turning to the Canadian Police College course, Mr. Ritchie mentioned 14 weeks in training. It was my understanding there were two courses in the polygraph. Am I correct in that?

Mr. Ritchie: Yes, you are correct. There is the polygraph examiners' course, as it is called, which is 12 weeks at the Canadian Police College followed by two weeks of actual testing of live suspects, if you will, under the supervision of an experienced examiner. Then there is an advanced polygraph examiners' course, which is basically a refresher to update technique.

Mr. MacQuarrie: From the recognition that the Canadian Police College has given to the polygraph and the nature of the courses it gives, I take it that at least the agencies operating that institution value the polygraph as well?

Mr. Ritchie: Yes, they certainly have an investment in it.

Mr. MacQuarrie: As an aside, in dealing with one of Mr.

Mackenzie's points, in the constituency I represent I know that one of the police forces does not have a professional or a certified polygraph operator on staff. I know also that they use polygraphy services. I have been recently advised that those services were of some significance in solving a particularly brutal murder. So forces that do not have certified polygraphers on staff certainly do make use of the service provided by others.

The bill we are concerned with here relates primarily to the use of the polygraph in the employment environment. We have heard some evidence from witnesses that the very existence of their business undertakings can depend on employee fidelity, reliability and honesty and that the polygraph is used not only in screening applications for employment but also in solving or assisting in solving situations that develop in the course of employment--loss, embezzlement and, more recently, I suppose, a case where firms are very, very concerned with industrial espionage, where their very existence depends on one particular trade secret or industrial proprietary item.

Can you see, Corporal--and I am asking you not as a police officer but as someone skilled in the operation of the polygraph--the polygraph having value in those circumstances?

Corporal Frechette: Yes, sir.

Mr. Swart: Mr. Chairman, this is the first time I have come into the committee while it has been considering this subject because I have been away, so I hope my questions do not repeat those that have been asked previously.

I want to get back to the margin of error on the polygraph. It appears that it is around 90 per cent; there seems to be some consensus on that by those who use it. I would assume that the degree of accuracy would relate to some extent to the training of the operator. Is that correct?

Mr. Ritchie: Oh, very definitely, sir.

Mr. Swart: In other words, an operator who might be engaged in the use of it for employment purposes and had not had the appropriate training could have a much higher degree of inaccuracy than 10 per cent. Would that be true if an untrained person was using it, not a fully trained person?

Mr. Ritchie: I am certain that he might not have a clue what he was doing. His accuracy rate might be zero if he had had no training or did not understand it.

Mr. Swart: So the use of this depends entirely on adequate training if it is going to be of any use at all.

Mr. Ritchie: Training would be a very big factor. I suppose it also depends on the abilities of the operator and so forth, but training is a very big factor.

Mr. Swart: I presume these polygraph machines are

available to anybody. They are on the market; the police or anybody can go out and buy them. Is that correct?

Mr. Ritchie: That's my understanding.

Mr. Swart: And anybody could use them whether he had training or not. They could have two, three or four hours' training and put them to use. There are no laws against those things at the present time.

Mr. Ritchie: That's correct.

Mr. Swart: To change a little, I would like to ask you a follow-up on my colleague Bob Mackenzie's question. Generally, do all of the municipal police forces use your services where they do not have equipment and operators of their own, or are there some police forces that do not use them as a matter of principle? Let me rephrase that. Do you know of any police forces in Ontario that do not use the polygraph tests as a matter of principle?

Corporal Frechette: Are you asking me, sir?

Mr. Swart: Either one.

Mr. Ritchie: We will both reply, then. No, we in the ministry--of course, I am including the Ontario Police Commission--have not heard of any dissenting police forces. To the best of our knowledge the members of the police community are all of the view that the devices are useful in furthering police investigations. Possibly the corporal has more precise information than I do.

Corporal Frechette: My answer is basically the same. I am unaware of a police force in Ontario that is philosophically opposed to them.

11 a.m.

Mr. Swart: I am wondering if there is a wide variation in the amount of use. You state that you conduct 150 to 160 tests a year. I presume these are tests which you conduct for yourself and tests which you conduct upon request from municipal police forces. Have you any idea how many tests in total are taken in Ontario in a year? Is there any reporting from regional governments or from police forces on how often they use the polygraph machines?

Mr. Ritchie: No sir, there has been no effort to collect statistics on use.

Mr. Swart: It could be the case, I presume, that some forces might use them quite extensively and others use them very little.

Mr. Ritchie: I should qualify my last answer. I am certain that if I had asked for the figure, I could obtain it because the Ontario Police Commission would go to each of the forces that use the machine and would definitely be able to give

us a number. I meant we have not, in the ministry or in the Ontario Police Commission, collected that statistic from the individual users.

Mr. Mackenzie: I understand from your figures that probably 40 per cent of them are done for municipal forces. That means that 60 to 65 of the yearly tests are done for various municipalities.

Mr. Ritchie: I think it is backwards, sir.

Mr. Mackenzie: You conduct 150 to 160 and approximately 40 per cent are from municipal police forces.

Mr. Ritchie: That is correct, sir.

Mr. Mackenzie: So you would do 60 or 65 in the course of a year for the various municipal police forces.

Mr. Ritchie: No, sir. We are talking about the Ontario Provincial Police conducting 150 to 160 tests a year. They do 40 per cent of those for municipal police forces on request. The other 60 per cent they do for themselves.

Mr. Mackenzie: That is exactly what I was thinking, so I am presuming that is how many you would then be doing for various municipal forces.

Mr. Ritchie: About 40 per cent of 150 to 160 is the number they do for municipal forces in a year.

Mr. Mackenzie: I think that comes out to 60 or 65. Maybe my arithmetic is wrong.

Mr. Swart: I think you are right, but that does not include the eight police forces that have equipment and operators of their own, does it?

Mr. Ritchie: No.

Mr. Swart: And we have no idea of how many of those are used.

I am wondering if it might be possible to get those figures. It seems to me they are relevant to the discussion and deliberation on this bill, to get some indication of whether there appear to be abuses in some areas. There is tremendous use of the polygraph machine, therefore, I think I would like to have that in total and a breakdown from each of the eight police forces in Ontario.

The only other question I have relates to the voluntary nature of the tests. You stressed in your brief that it is entirely voluntary when anyone takes these tests. I am wondering if you would like to comment on the fact that when a person is being interrogated by the police, he might feel that it is not entirely voluntary whether he takes these tests when he is in that position. To a large extent, they are "subject to the requests" of the police.

Mr. Ritchie: I would not know what goes through the person's head. There may be some kind of peer pressure or whatever to co-operate or try to establish one's own innocence or some thinking of that nature. However, the bottom line is the person does have a choice, and the police are in no position--and they make this very clear--to require it. He has to be prepared and willing to do it of his own free choice.

The other point I would like to make is that we are talking about major offenses. The use of the polygraph is an expensive and time-consuming operation, and it is really only used for very serious crimes. So, in those cases, the person is going to have a lawyer. Corporal Frechette and his colleagues are dealing with lawyers all the time. As I think I mentioned, they will make any kind of accommodation for the lawyers. Many lawyers want the proceeding videotaped. I don't think there is a real concern that anybody is being forced or pressured into it.

Mr. Swart: You mentioned--

Mr. Mancini: One supplementary question. What is the cost per test?

Mr. Swart: That was going to be my question.

Mr. Mancini: I'm sorry, Mel. Go ahead.

Mr. Swart: You mentioned cost. Is that the cost of the purchase of the equipment? Is there a very substantial cost for usage? If so, why?

Mr. Ritchie: Really, I was only talking about the overhead cost: they have sent an officer for extensive training, his time is committed to this work, and he is travelling with the OPP. They are spread from one end of the province to the other. We are out an officer for a year--in the case of the OPP, we are out two officers for a year--plus all the travel expenses. I don't know what cost they would attribute, \$100,000 or whatever.

Mr. Swart: What is the cost of the polygraph machine? Do you have any idea?

Mr. Ritchie: My colleague tells me it is approximately \$8,000.

Mr. Swart: For total police operations, that is not a great deal. If a police force owned its own machine and had its own operator, then the cost would not really be very great for the use of this machine.

Mr. Ritchie: No. The day-to-day cost is really the time and so on associated with the officer.

Mr. Swart: I will just make the request that we get those figures. I think they are relevant.

Mr. Chairman: We certainly will try, Mr. Swart. Thank

you, Mr. Ritchie and Corporal Frechette, for being here and helping us with our deliberations.

Mr. Ritchie: Thank you, Mr. Chairman. It was a pleasure.

Mr. Chairman: The next group is the Canadian Association of Police Polygraphists, Mr. Brian Lynch and Mr. Gary Nicholls or anybody else they have. Would you please identify yourselves, gentlemen, and carry on with your presentation?

Sergeant Nicholls: Thank you. First, Mr. Brian Lynch is not available today. My name is Gary Nicholls, and I am a sergeant with the Niagara Regional Police force. This is Sergeant Tom Dalziel of the Metropolitan Toronto Police force.

I would indicate to the committee that I am a police officer with the Niagara Regional Police force. I have been on the police force for 15 years. I was trained as a polygraph examiner for our course in 1980 at the Canadian Police College in Ottawa. I am prepared to outline for the committee the training course content, certification program, as well as the selection procedure as regards the Canadian Police College and the polygraph training section.

I am here to address the committee as an appointed member of the legislative committee for the Canadian Association of Police Polygraphists and as a police polygraph examiner.

Mr. Mancini: Excuse me, is there a written brief?

Mr. Chairman: It is an oral presentation, Mr. Mancini.

Mr. Nicholls: I would identify for the committee that the Canadian Association of Police Polygraphists is an association of police officers from across Canada who are or have been trained in the use of polygraphic detection of deception as an aid to criminal investigations. The association membership includes at present members of the Canadian armed forces, the Royal Canadian Mounted Police and provincial police agencies as well as municipal police forces. Membership totals approximately 100 members, of whom about 80 are actively conducting polygraph examinations.

Our association sets out a code of professional standards and defines the polygraph as an instrument that is capable of recording visually, permanently and simultaneously the indications of a person's cardiovascular pattern and changes therein, a person's respiratory pattern and changes therein and a person's galvanic skin response and changes therein. In addition, indications of other psycho-physical changes of bodily responses may also be recorded.

11:10 a.m.

The objects of our association are to encourage and develop the co-operation of all Canadian police organizations in the professional and ethical use of the polygraph for the detection of deception; to advance the scientific, professional and public acceptance of the contribution of the polygraph to the promotion

of the public welfare; to promote and maintain high standards of ethics, integrity, honour and conduct in the polygraph; and further, to advance the knowledge, skill and status of those involved in the field by providing a clearing-house for ideas and experience and by promoting research and discussions on all phases of the polygraph. In addition to a quarterly publication, our association sponsors an annual seminar workshop in order to keep members abreast of ongoing advances in the polygraph field.

The concerns of the Canadian Association of Police Polygraphists regarding the proposed amendment to the Employment Standards Act are the following:

First, under the definition of "lie detector test" in the proposed legislation, the polygraph instrument unfortunately is included with other devices purporting to detect deception. As the committee has been made aware, scientific research for polygraph validity is overwhelming, while the research for other so-called lie detectors is all but nonexistent.

We as an association are somewhat concerned with regard to subsection 39b.(3) of the proposed legislation, which states: "No person shall communicate or disclose to an employer that an employee has taken a lie detector test, or communicate or disclose to an employer the results of a lie detector test." This subsection may well effectively end the polygraph application as a police investigative aid in cases of internal theft. It moves well into the field of police investigative latitude, an area that I might mention even the Supreme Court of Canada has cautiously guarded and protected in its judgements over the years.

We as an association would further voice concern regarding the prohibition of police applicant screening being included in the proposed legislation. Although there are at present no police forces in Ontario using the polygraph to screen applicants, several forces across Canada report very satisfactory results and consider it an integral part of their selection process. We in CAPP feel that when consideration is given to the need for police forces to hire exceptional citizens, polygraph screening as a part of the selection process has proven extremely effective.

We, the Canadian Association of Police Polygraphists, would respectfully request that the committee consider our position as it relates to the proposed amendments to the Employment Standards Act, our position being that:

First, we support the continued use of the polygraph by properly trained members of police agencies within Ontario as an aid to criminal investigations;

Second, recognizing the potential for abuse, we support the use of the polygraph in all aspects of personnel management, with the following provisions: that the requirement to take a polygraph examination be voluntary and not a sole condition of employment; that a polygraph examination incorporate a device and technique, as has been recommended in a British Columbia Police Commission task force on private security, which proposed a polygraph examiner's act, which is basically the licensing of all polygraph

examiners in that province and that the polygraph examiner be licensed as recommended in the task force carried out by the British Columbia Police Commission.

In summation, as a member of the Canadian Association of Police Polygraphists and a trained polygraph examiner, I will endeavour to answer questions the committee may have relating to both the association and the practical aspects of polygraph usage by the Canadian police community.

Mr. Chairman: Mr. Nicholls, you probably heard the question Mr. Swart asked the previous group, asking about the figures, about the other police forces. Would you have any of that information?

Sergeant Nicholls: I am able to provide approximates. I have been conducting polygraph examinations since 1980. Since that time, I have averaged between 70 and 85 tests per year. This is within the Niagara Regional Police district.

Mr. Swart: I want to get back to your concern about subsection 39b.(3). Do you not think section 39d. qualified that to eliminate your concern, where it says, "Nothing in this part shall apply so as to prevent a person from consenting to take and taking a lie detector test administered on behalf of a police force in Ontario or by a member of the police force in Ontario in the course of the investigation of an offence."

Sergeant Nicholls: It may well do, sir. I must admit to some ignorance with regard to the wording of the bill. I have discussed it with members of my association with regard to the bill. However, it does leave me personally with some confusion as to where I stand as a police polygraph examiner when I may conduct an examination as part of a police investigation which is obviously an internal theft. Where and when am I allowed to disclose the results? That is my confusion. If section 39d. eliminates my concern, it is just a misunderstanding on my part.

Mr. Swart: I think your point is well taken. It needs to be clarified. Although it is not exactly covered in subsection 3, it seems to me we give the authority to do it. However, I think your point is well taken. I can understand there would be some need, frequently. When there is an internal criminal investigation within the force, there would be need to report this to the chief or to the police commission.

This point has been covered before. However, I would like to ask you who makes the determination on whether you take a test. You obviously are authorized by someone to take the test. You do not make this decision on your own. Is it the chief? From whom do you get your instructions? Let me put it not so personally. In general terms, who makes the determination in a force of whether a polygraph test shall be taken?

Sergeant Nicholls: Mr. Swart, I can only speak for my own force regarding our policy, but I believe there is some form of approval in each force. In the Niagara Regional Police force, the request by an investigator to have a subject or suspect tested

under polygraph is first submitted through our criminal investigation branch inspector who will peruse the occurrence and make a determination if he agrees. Then the request is forwarded to our deputy chief of operations who authorizes the test be conducted if, on his perusal, he agrees with it.

11:20 a.m.

The ultimate decision on whether a polygraph examination is ever administered, and I think this is the case in all forces, is up to the polygraph examiner. He is the officer responsible for determining whether an individual is suitable to be tested. That suitability is based on information gleaned from a particular individual during the course of the pre-test discussion or interview prior to the test being conducted.

Mr. Swart: To make sure they understand, what is done then is that somehow or other, from the time a person may be arrested or the recommendation is made by some officer that a polygraph test should be taken, that finds its way to the deputy chief in charge of operations or some senior official, and that more or less comes as an instruction to you to take that test, subject to the person being qualified to take the test.

Sergeant Nicholls: When I receive the request from our deputy chief, I am authorized to conduct the test. At that point it is my determination whether the test is carried out.

Mr. Swart: And you would report back reasons why you did not take the test, if you felt it should not be proceeded with.

Sergeant Nicholls: Most definitely, sir.

Mr. Swart: What percentage of those persons you have been authorized to test would you not proceed with? Would it be 10 per cent, 25 per cent, two per cent?

Sergeant Nicholls: This is simply a guess but I think, based on experience, it would be in the area of two to five per cent.

Mr. Swart: You were here when the previous brief was presented and know the OPP have 150 to 160 polygraph tests a year. I understand you to say you take approximately 75 in the Niagara region. It would appear that your use of it, therefore, in the Niagara region is much higher than that of the OPP which took 100 for itself and only 60 for all the other police forces in Ontario. In other words, the Niagara region has taken as many tests as all police forces in Ontario other than the eight regional police forces mentioned here.

Could you explain whether there is this wide discrepancy and variation in the use of the polygraph test between one police force and another and, if so, why?

Sergeant Nicholls: I suppose I can shed some light on the figures by saying, first, I conduct polygraph examinations for outside agencies as well. I have, as a matter of practice,

conducted polygraph examinations for the city of Hamilton, Halton region before it had its own examiner, as well as for Immigration and the Canadian Pacific police. Therefore, that figure is reflected in my total numbers.

Second, I would suggest my immediate availability would have something to do with the numbers of tests I am able to conduct. I believe the fact was mentioned that during the course of an OPP test a great deal of travel is involved. That is not the case in my area. I am most usually available very soon. As a matter of practicality, I would suggest,--I cannot speak for the OPP, I can only suggest--that because of the need to travel they may well be involved in a majority of very serious offences, whereas I may well conduct polygraph examinations that the OPP might, as a matter of priority, have to set that matter down, as the case may be.

Mr. Swart: Could you tell me how many of the 75 or so tests are taken for the Niagara Regional Police force? I am not tying you down to exact figures.

Sergeant Nicholls: I cannot provide exact figures, Mr. Swart, I am sorry, but on average I am saying 75. I would think that probably out of that I may conduct 10 for outside agencies, so it would be--

Mr. Swart: So it is a minor proportion, and it would appear that although we do not have the figures from the other regional forces mentioned here, it is substantially more than those used by the police forces, at least, that do not have the polygraph equipment and operators of their own.

Mr. Mackenzie: May I have a supplementary, on that, Mel? Can you tell me whether or not you conduct any tests for an agency other than a police agency of one sort or another?

Sergeant Nicholls: I have never yet conducted a test for any agency outside of, say, the police or the government.

Mr. MacQuarrie: You mentioned Immigration earlier, I thought--

Sergeant Nicholls: Yes, it was for the investigators within Canada Immigration.

Mr. Swart: The final question I have relates to your comments about the use of the polygraph machines in employment. I do not want to misquote you, but you did state that the tests should be voluntary and should not be the sole condition of employment; I believe those were the words you used. Surely you would not indicate that if an employer was using polygraph tests and a person refused to take one, there is any likelihood that he would be employed.

Sergeant Nicholls: There are indications that--

Mr. Swart: I am a bit familiar with this problem. When they have 100 applicants for one job, they are going to take the

employee they think is absolutely the best and that does not have a single mark against him. Would you not agree that if anybody refused to take a test, his chance of generally getting employment at that company would be zip?

Sergeant Nicholls: I would suggest that if it is a part of the selection process, it may well eliminate that individual from proceeding further with his application. But although I am not involved in pre-employment screening, of course, in our force, I really cannot speak to those agencies which do include that in their process. I do not know what position the administration takes. In reality you may well be very right.

Mr. Gillies: I would like to comment on a couple of the points that Mr. Swart has highlighted and that you have commented on, Sergeant. At the ministry, we do draw a very clear distinction between the use of the polygraph machine in specific-instance investigation of the type you are conducting in a criminal investigation and its use in the employment sphere, in particular as it relates to screening. Mr. Swart highlighted one of the problems, which is the qualifications and training of the people conducting the tests.

When we zero in on the problem in subsection 39b.(2) and section 39d., there certainly would be an anomaly if the training and qualifications were the only concern, but they are not. In our view there is a substantive body of evidence that has been pointed to that would indicate an accuracy range, we have heard, as low as 70 per cent and as high as 90 to 95 per cent in specific-instance investigations. But as Professor Saxe, one of the expert witnesses last week, indicated, there is no body of evidence to indicate the accuracy of the machine in screening situations or, if you will, fishing expeditions.

So there is a distinction there. Even within a police department we would draw a distinction between the use by the police department as an employer in screening and the use by the police department in a specific-instance investigation.

There is one problem that we do accept and that I will have the legal department of the ministry look at. It is the anomaly that if you were conducting an investigation on a specific instance of a crime that may have occurred within the police department, there could be a problem then in that the results of the polygraph test could not be communicated back to the senior police officer, who is the employer. We recognize there may be a problem with the wording there and we will report to the committee on that point.

11:30 a.m.

Mr. Mackenzie: My point relates to somewhat the same matter Mr. Gillies has just referred to. I have not come down in my own mind as yet. I certainly support this bill. My colleague's question as to whether section 39d. should or should not be part of it is an issue I have not resolved yet. I have some reservation about taking the use of it away as a criminal investigation tool.

I was concerned about your presentation in that it struck me you were going beyond what we had heard previously from the Solicitor General's office in advocating this intrusion beyond criminal investigations, to ask for screening for employment in the police force itself. At the same time, in terms of employee screening this bill has the effect of denying the use of the machine as one of the tools. I just wanted to be sure if that was a correct impression or if I am wrong on what you were saying.

Sergeant Nicholls: That is a correct impression, understanding that as a police officer in Ontario I am not required to and do not conduct screening tests. I am speaking on behalf of a Canada-wide association where screening police applicants is done routinely, and is reported to be extremely effective and an integral part of its selection process. That is a position the Canadian Association of Police Polygraphists takes in regard to screening tests in regard to the police.

Mr. Mackenzie: I guess there are others we can ask. I am just wondering if that is the general policy also of the police association or the chiefs of police in the province. Are you aware of whether that would be their position?

Mr. Chairman: They are on next, so we can ask them.

Mr. Mackenzie: Fair enough; we will leave it there. However, that was my concern, that you are making an exception. I have this difficulty with somebody being presumed guilty until he proves his innocence which has been the basis of some of the presentations to us on the use of the polygraph.

Sergeant Nicholls: I might add to my comments, just as a matter of clarification, that we do recognize there is a potential for abuse. That is why we are suggesting the use of it be very closely scrutinized and the licensing of all examiners so some standard can be held out for polygraph examinations in the province.

Mr. Mackenzie: I share the concern of my colleague. Maybe it is my labour background. It is not the issue we can nail you on but they will sometimes use--it seems to me that in the case of somebody applying for a position in the police force that if they, for whatever strong personal reasons, exercise their right to refuse that test it probably would go against them even more than it would against somebody in another area of endeavour. I have some real concerns if that is your position.

I find it difficult to have a bill suggesting this cannot be a tool for employment screening and yet we want the exception for it. I can understand the arguments in terms of the criminal investigation. I have much more difficulty with the screening device for employees.

Mr. Gillies: You appreciate we are not suggesting that.

Mr. Mackenzie: I wondered why they were going a little beyond what was in there.

Mr. Mancini: How many members does your association include?

Sergeant Nicholls: I indicated it includes approximately 100, of which I believe 80 or so are active polygraph examiners.

Mr. Mancini: During questioning and discussion with Mr. Mackenzie, it was clearly brought out that you certainly are in favour of screening any potential employee of any police department. I think that is a fair statement.

Sergeant Nicholls: Generally, as an association, yes, we do agree with police polygraph screening.

Mr. Mancini: For some reason, I am getting the impression from the previous delegation and from yourself that basically you believe--and please correct me if I am wrong, don't hesitate to jump in--the problem in Ontario is not so much with polygraph testing, but that we do not have a situation where people can become properly trained and licensed and, under certain conditions, would then be able to conduct polygraph tests. Am I reading that correctly?

Sergeant Nicholls: That is a very strong concern for me personally as a police officer and as a representative of our association. It brings back to light comments made, I believe, by Mr. Swart with regard to the fact that, as it stands at present, there is nothing to prohibit an individual from going out and purchasing a polygraph instrument and commencing to administer polygraph examinations. We would obviously be concerned about the validity of those tests. We are suggesting that yes, by all means, the ministry should consider licensing.

Mr. Mancini: You would have that as an option to Bill 68?

Sergeant Nicholls: I am getting out of my area a little bit. I admittedly do not understand the procedures involved in the government process. I suggest, though, that however it can be done, the government should explore licensing and include it in whatever act it makes.

Mr. Swart: May I have a supplementary along that line? Do you know if there are other jurisdictions in Canada that do license polygraphists?

Sergeant Nicholls: No, I do not. My only information is about the task force investigation that was conducted by the British Columbia police commission. I am of the understanding that to date that has not been acted upon.

Mr. Swart: Do you know if they do in United States, are there states where they are licensed? It seems to me to make obvious sense.

Mr. Gillies: Perhaps I can be helpful there. In the United States, about 20 states have outlawed the use of polygraphs, as we are contemplating doing. About 19 more have

various forms of controls or licensing. To the best of my knowledge, no other province has moved in the area of licensing.

Mr. Swart: It would make obvious sense; if you are going to permit the use of them in any event, there should be licensing of the operator. You claim they are an important tool. If they are an important tool, there should be a qualified operator only using the polygraph, if we are going to use them anyway.

Mr. Chairman: Mr. Swart, he makes the argument for the polygraph. He actually adds to it, "If you are going to do it, you should do it under licensing." His basic argument is, if we are going to do it; but we are not considering it.

Mr. Swart: I am agreeing with him. I am just trying to find out if this--

Mr. Chairman: He is just clarifying it by saying they should be licensed. That is the way I understand it anyway.

Mr. Gillies: I do want to assure you that before this legislation was brought forward, the ministries involved looked at the options. One of them certainly was licensing. For a number of reasons, not so much the technical reasons as what we see as the legal and moral reasons, if you will, we opted for the elimination in the employment context. I could elaborate on that if you wish, but you said you hoped we would look at it. I want to assure you it was looked at.

Mr. Mancini: As I said in the Legislature, I certainly support Bill 68. I have been told there may be some amendments forthcoming. I would not want to prejudge my position on any of those amendments, so we will have to wait.

Basically, I have a very serious problem with us putting so much faith in a machine when we have received testimony. I have a great deal of evidence here from very knowledgeable people where accuracy is claimed from a low of 70 to a high of 96.7 per cent.

11:40 a.m.

I have great difficulty with the type of--how should I say it? It is almost as if we are worshipping a machine that is going to be able to help us solve these problems, maybe to the detriment of some of the other things we could possibly be doing. I cannot give you examples of those particular things because you people are in police work and I am not.

It makes me a little nervous that police departments are really so gung-ho on this stuff when we think of the damage that can be done to innocent people. It is supposed to be that no one is found guilty unless there is a preponderance of evidence against a particular person, and lie detector tests are not allowed as evidence anyway, yet we are very willing to have prospective police officers take these tests and use that as a serious indication as to what type of individual that person can or will be.

As you said yourself, and I would like to quote, "screening applicants done routinely"--I assume you mean somewhere across Canada.

Sergeant Nicholls: Yes, and in some other agencies.

Mr. Mancini: --"is effective." I do not know how anybody can make a quote like that. I am not trying to take away from your professionalism, but we can obtain piles of evidence from people who claim to be experts on the other side, and even experts in the field of polygraph testing would say the accuracy rate has a range of 30 per cent from 70 to 96 per cent.

We have heard from you and the previous group that the operators have a lot to do with this as to how they are trained and what type of questions they ask and the order in which these questions are asked. I think we are moving towards relying on this machine maybe a little faster than we should. That basically makes me nervous. It kind of gives me a chilling feeling that we would seem to want to depend on these tests.

Personally, I find it highly offensive to have people screened before they are employed, whether they be police officers, or employees or prospective employees in private firms or in government. Maybe I am not asking questions but I am just trying to let you know how I feel about us being so gung-ho about these machines when there is so little background information.

Even the professionals who use these machines have told us there has been a big surge in what they perceive to be the effectiveness of these machines since 1977. We ask, "How do you know?" They say, "We have done these tests." We ask, "What do you compare those tests to? What benchmark are you using to establish these statistics when you say these machines are pretty accurate? How did you come to interpret the answers of people who have been questioned to determine that they are accurate or not accurate?"

I will not pull out the great deal of information I have because we are running way behind time. Those are a couple of questions I have and some of my basic concerns. I am especially concerned about police departments because you have such an important and tremendous role to play in our society. Police departments, in my view, should be the last group to want to embrace any type of new technology that may not in all cases--and from what we have been told, may not in many cases--be accurate.

Mr. Chairman: Thank you for voicing your concerns.

Mr. Mancini: You are quite welcome.

Mr. Chairman: We have a few more questions. Mr. MacQuarrie, I think you are next.

Mr. MacQuarrie: I have two questions, Mr. Chairman. We heard a reliability rate expressed by the representatives of the Solicitor General's department, the OPP, of 90 per cent. You have indicated that for three years you have been conducting an average

of 75 tests a year. What is your experience in terms of reliability?

Sergeant Nicholls: I have found it very much along those same lines. I do not have exact figures or percentages, but I am conducting tests where I am getting in the area of from five to 10 per cent indefinites. In other words, I am not able to form my own opinion on whether the person is being truthful or not. I must rely on the studies, as far as statistics go, because without question, there are a number of examinations where I, as a polygraph examiner, form an opinion and inform the investigators of my opinion, but that opinion may never be verified.

Mr. MacQuarrie: Do you feel then that the 90 per cent figure that has been referred to during the submission made by the Solicitor General's representatives is accurate?

Sergeant Nicholls: Based on my personal perusal of studies that have been conducted, yes, I do.

Mr. MacQuarrie: Yes; and on your own personal experience?

Sergeant Nicholls: Yes, sir.

Mr. MacQuarrie: Thank you. You indicated that in some jurisdictions the polygraph was used by police departments as part of the applicant-screening process. I wonder if you could give us a few examples of forces that are using the polygraph in this way?

Sergeant Nicholls: I believe that was mentioned earlier. I am only going on my recollection of the presentation, but I know, for example, that the Calgary police service uses it. I believe the Edmonton city police use it, the Regina police service uses it, and Saskatoon and Winnipeg. I would be guessing to go further than that.

Mr. MacQuarrie: No, that is fine. Those are all very well-known police forces.

Mr. Chairman: Could you give us an indication of whether the Royal Canadian Mounted Police uses it? Have you any idea?

Sergeant Nicholls: I believe they do not use it.

Mr. Chairman: Thank you. With the committee's indulgence, the parliamentary assistant has a question for Sergeant Nicholls.

Mr. Gillies: A couple of very quick questions, if I might, Sergeant. On average, when you administer a test, how long does it take and how many questions do you ask?

Sergeant Nicholls: On average, a polygraph examination I conduct based on my training takes two and a half to three hours. As far as questions put to the individual are concerned, if you are referring to questions put to the individual while he is attached to the polygraph instrument, there are routinely nine or 10 questions put to the individual.

Mr. Gillies: Thank you. As I understand the technology, you ask a set of preliminary questions to set the machine to the normal reactions of the individual person before you get into the substantive questions on the specific incident.

Sergeant Nicholls: Yes, sir. They are identified as irrelevant questions, along the lines of "Is your name so-and-so," leading to obviously truthful responses.

Mr. Gillies: The total process you are looking at would take two and a half or three hours. How much of that time would the person actually be hooked up to the machine?

Sergeant Nicholls: Routinely, as a matter of training, I would conduct three polygraph charts. By far the greater part of the interview is conducted one to one, having reviewed the questions with the individual and having had him clarify any particular problems he may have with them. At that point he is attached to the polygraph, and I would then run three polygraph charts, each chart having a duration of approximately three and a half to four minutes; so in total he would be attached to the polygraph for about 12 minutes.

11:50 a.m.

Mr. Gillies: Presumably, then, the cost of your time for two and a half hours, the cost of the machine, the facilities and everything you are doing would be several hundred dollars per test. Would that be roughly what you would think when you count everything in?

Sergeant Nicholls: I do not know how much it cost the force to train me, quite frankly, but just considering my time--we are talking about three hours of my time at whatever my salary is--I am trained now and my function is to conduct polygraph examinations. I do not know how to put a dollar figure on it other than the fact that that is my time involved.

Mr. Gillies: I can appreciate that, and I thank you. The point I was trying to draw here was that when Professor Silverberg was before the committee last week, he said that in an examination he conducted--and I think he was trying to impress on us how quick and painless the procedure was--he alluded to six or eight questions.

We have conducted a bit of a survey from the ministry and have found that a private polygraph test can be purchased, if you will, in this province for \$40. It would suggest that the process, the length of the interview, etc., is not quite what you as a police officer are conducting.

Mr. Mackenzie: It also raises questions as to the quality of some of the tests at that kind of price.

I have just one question that I had forgotten before. An article in the ministry's own background information was concerned with the ability of habitual liars to escape detection, innocent

people overreacting because of stress as a result of the questions and, more important, the use of tranquillizers being able to get around it. It mentioned one which is widely known as Miltown, I guess, and under other trade names. According to the article that was given in the background paper: "Furthermore, the people administering the tests were unable to tell who had taken the tranquillizer and who had not. The dose was chosen as the typical minimum that is medically used."

Do you have any way of knowing whether somebody has had a tranquillizer such as this? Is this a concern, or is this something you are not in agreement with as to its actual effect on tests?

Sergeant Nicholls: Referring to the ingestion of drugs?

Mr. Mackenzie: Yes.

Sergeant Nicholls: It is an obvious concern, and it is a concern that a trained polygraph examiner should always be aware of. Not being a medical individual, I am left only to my own perceptions of whether that person has ingested drugs. If there are no outward signs of ingestion, then I am going to be watching the polygraph tracing very carefully for what may show as drug ingestion. But again, I admittedly would not know unless outward signs were presented to me.

Mr. Mackenzie: Relatively readily obtainable tranquillizers such as that, taken orally, could very definitely affect it, and you would have no way of knowing?

Sergeant Nicholls: I would qualify that a bit by suggesting that on the basis of my experience--and I have had individuals indicate to me that yes, in fact, they had taken certain tranquillizers--I believe that for the most part, if an individual has taken tranquillizers to the point where it is going to be a grave concern to me as to the results of the polygraph test, there will be some outward signs of his impairment or whatever.

Mr. Mackenzie: In this article they are talking about normal medical doses and the fact that they were unable to verify or that you would not know that the person taking the test had taken them.

Sergeant Nicholls: I can only say that it is a concern.

Mr. Swart: Just a brief supplementary to the parliamentary assistant's question. When you take these tests, are there just you and the person who is being tested alone in the room, or are there frequently other people in the room where they would be taking them?

Sergeant Nicholls: There are no other individuals in the room. The test is conducted in a very quiet room with the examiner and the subject.

Mr. Swart: Thank you.

Mr. MacQuarrie: One further question to the representative from Metro Toronto. How many polygraph tests are carried out by Metro Toronto?

Sergeant Dalziel: We commenced a polygraph program in Metro Toronto on September 1 of this year. To date we have done 24 specific issue tests.

Mr. MacQuarrie: One further question: Before you commenced the program, who was doing your polygraph work? Was any being done?

Sergeant Dalziel: Yes. There was polygraph work being done for us by members of the Durham Regional Police force, by the Ontario Provincial Police and by Peel Regional Police.

Mr. Chairman: Thank you, Sergeant Nicholls and Sergeant Dalziel, for being here and for being so informative.

Sergeant Nicholls: I thank the committee for the invitation.

Mr. Chairman: The next group is the Ontario Association of Chiefs of Police, Deputy Chief Jim Gayder and Chief Thomas Welsh. While they are coming to the table I would remind the honourable members we have one more group to see, so could we try to keep the questions as short as possible?

Gentlemen, would you please identify yourselves?

Chief Welsh: I am Chief Tom Welsh of the Ottawa police force, chairman of the legislation committee of the Ontario Association of Chiefs of Police, also vice-president of the Canadian Association of Chiefs of Police. I mention that simply because I will be discussing some other areas in this country.

I have on my right Superintendent Barry King, and on my left is Detective Sergeant Alf Thomas and Detective Dave Knox, all of the Peel Regional Police. Deputy Chief Gayder who was to be with me this morning has simply not arrived as yet. He did have some meetings to go to, but he thought he would be able to make it.

My presentation is not a long one. I would say to all members of the Ontario Legislature, and more particularly to this standing committee, I wish to take this opportunity to thank you on behalf of the Ontario Association of Chiefs of Police for affording us the time to appear before you.

I would now direct your attention to Bill 68 and subsections of this bill. The following statement is the position of the Ontario Association of Chiefs of Police and the Canadian Association of Chiefs of Police on the use of polygraphy in police personnel screening and police investigations.

We support the use of polygraphic testing in the screening of personnel with the following provision: that the test be

administered on a voluntary basis and not be considered a condition of employment.

It is our contention that the use of polygraphy in police personnel screening does not constitute a violation of privacy or an infringement of free consent. There are no documented cases in Canadian police hiring wherein refusal to take a polygraph test has been the sole determinant in the termination of a candidate's application.

The use of polygraphy in Canadian police candidate screening dates back to the mid-1970s. At present, the forces in Canada using this procedure routinely are the Calgary police service, the Regina police service and the Winnipeg city police. Police forces in Edmonton, Saskatoon and Vancouver have also been using polygraphy in screening on an ad hoc basis.

These various police forces report that polygraphy is an essential feature in their personnel selection. With its application, they have been able to screen out many undesirable candidates who admitted committing Criminal Code offences. They also claim an increased confidence in their screening procedure because of polygraphy. It must be understood that polygraphy does not exclude the use of more traditional screening methods, such as background investigations, but it has proven to be an invaluable adjunct to the employment procedure.

12 noon

There are, at present, no police agencies in Ontario using polygraphy in their hiring process. However, polygraphy in Ontario is still relatively new and it is foreseeable that there will be future considerations of such an application.

The police community in Canada is very satisfied with the efficacy of polygraphy in its more traditional application to the investigational process. We view it as a highly reliable technique for assessing veracity and therefore an essential tool in all levels of investigation. With this in mind, we support the inclusion of the exception section 39d. of Bill 68.

Thus, it is the opinion of the Ontario Association of Chiefs of Police and the Canadian Association of Chiefs of Police that the proposed legislation prohibiting the use of polygraphy in the personnel selection of police officers is undesirable. Furthermore, we feel that such legislation necessarily casts aspersions on the field of polygraphy as a whole, and has the potential of eroding the public's confidence in the technique, irrespective of its application.

Graduates of the Canadian Police College polygraph school are required to undergo an intensive training period of 12 weeks combining the academic and applied use of the polygraphy procedure.

This exceptionally demanding course also requires a minimum of three hours study per night and eight hours on the weekend. Each candidate is responsible for researching and writing a selected polygraph topic. There are weekly performance

examinations in both the practical and the theoretical use of the procedure.

At the completion of this 12-week period, the candidates are sent into the field to conduct polygraph examinations under the guidance of an experienced examiner and his work is closely scrutinized by the trainer and the school. Upon completing this phase, the examiner returns to his force and begins to conduct examinations. These are also subjected to strict quality control standards at the school. If the first 30 tests meet the standards of accuracy and interpretations required, the candidate then receives his diploma.

I simply attach to the brief the diploma of one of the members of my force. I have two on my force who are polygraph examiners.

Mr. Chairman: Thank you very much for your presentation. Mr. Mancini, I think you have the first question.

Mr. Mancini: Just reviewing the brief very quickly--I know we are running behind--it appears this police association, the police chiefs of Ontario, want to leave the option available to prospective individuals who want to join the police force as to whether or not they take a polygraph test.

I just want to tell the chief and all the detectives who are here--I note you point out specifically that there are some police forces, as was done earlier, in Canada that request prospective police officers to take tests. Then it is stated underneath that this has helped keep undesirable individuals from joining those forces.

I just want to tell you that I do not think any police department in Ontario is secondary to any municipal or provincial police organization in Alberta, in the city of Edmonton or in the city of Calgary. I think Ontario has done just as good a job, if not better, in hiring police officials and police persons to do their work as those places have done.

Our ability to prove that we have been able to hire people, and over a long period of time to show that we have been able to hire quality people, in effect, almost disproves what you have tried to prove.

Chief Welsh: With respect, I have to disagree because we do know that at times, maybe a year or 18 months or so down the road, we find an individual is not as desirable as we first thought. I would suggest that from the experience these people have had--it is not my own personal experience--these people who are using it, they have been able to eliminate some and therefore they feel it is a desirable application.

Mr. Mancini: Let us just mutually agree to disagree.

Chief Welsh: Fair enough.

Mr. Mackenzie: Just very quickly: You can obviously

answer the question I had a little earlier, as the officer who does the testing for the Niagara region.

Do you not find your position a little bit incongruous here? There is no current screening use of the polygraph in Ontario, as I understand your presentation, and the Attorney General is fishing for legislation to prohibit the use of it as a screening device; and at the same time as the government has brought in this bill and we are debating it, you are making the case to extend the screening to your organization, where it has not, in fact, been used up until now.

Chief Welsh: That's right. It has not been used, but here again is the example I just pointed out. I am only saying to you that some of the forces in Canada that have been using it find it an accurate method and a viable application to screen an applicant. Really that is all I am saying. I do not know if the various ministries have some views on it. Is that on a moral issue or what? I do not know.

Mr. Mackenzie: I just find it passing strange that at the time they push us to pass the bill restricting it to screening, your presentation would be to extend its use in Ontario to a field where it has not been used here before.

Chief Welsh: No, but, wearing my other hat as the vice-president of the Canadian Association of Chiefs of Police, I do feel it is important that I point out to you their feeling on it, that's all.

One other remark I would like to make is that I heard this morning a reference to the machine itself, and we look at the quality of what we find. I think the real thing is that it is only as good as the administrator. The administrator of the polygraph is the individual we are concerned about. With the kind of training we give our people and their background, they do not just come on the job; they are usually detectives of many years' experience before they are even directed into this area.

The breathalyser is only a machine. It is also only as good as the operator of that breathalyser machine to get the readings in his application of it. So I think this is the important part, and from a police perspective we guard this very jealously. As the previous witnesses indicated, they strive for quality at all times and are continually looking at themselves and continually exchanging.

With respect to the private sector, I can only say, as the gentleman on my right did, that possibly what we are looking for in the private sector is licensing.

Mr. Swart: You may be looking for licensing in the private sector; some of us may be looking for exclusion.

I want to go back to page 1 of your brief, where you say:

"We support the use of polygraphic testing in the screening of personnel with the following provision:

"(a) the test be administered on a voluntary basis and be not considered a condition of employment.

"It is our contention that the use of polygraphy in police personnel screening does not constitute a violation of privacy or an infringement of free consent. There are no documented cases in Canadian police hiring wherein refusal to take a polygraph test has been the sole determinant in the termination of a candidate's application."

I want to turn that around and ask if you can tell me whether there have been any applicants who have been hired after they failed a polygraph test.

Chief Welsh: Failed or refused it?

Mr. Swart: Failed a polygraph test.

Chief Welsh: I would think that would be the whole purpose. If as a result of the test there was an indication that they were an undesirable, they would not be hired.

Mr. Mackenzie: What about the 10 per cent?

Mr. Swart: That is my question. What about the 10 per cent? In other words, if you fail that test, then you are not hired--

Chief Welsh: No.

Mr. Swart: --even though you may be one of that 10 per cent or 15 per cent or, in some cases, 20 per cent.

Chief Welsh: When we are talking about failure, I think if it is learned as a result of the test that the individual has a background that would be undesirable--I am not talking about just an individual failing the test as such, because I have heard here today there is the possibility that there are some--

Mr. Mackenzie: A variety of different means.

Chief Welsh: Yes.

12:10 p.m.

Mr. Swart: But you did not answer my question. Are you aware of anybody who has been hired by any police force, whether it is Edmonton, Winnipeg or the Regina force, when he has failed the test? Has anyone still been hired as a police officer?

Chief Welsh: No, I do not. I cannot answer that. I do not have that information.

Mr. Swart: It seems to me it would be an automatic exclusion. That is the purpose of taking the test. If you fail that test, you would be excluded from that police force even

though you might be one of that 10 per cent. Would you not think that is a pretty unfair situation if that happens?

Chief Welsh: I do not know. There are many people who want to take the test. Many applicants want to take the test, whether or not it has been suggested they have some kind of a past or whatever. I can see an individual who may be convicted of speeding. Is this a good person to have on the force? On the other hand, he may deny this. I would not be overly concerned about that. I would be looking at the individual, at the type he is today.

Mr. Swart: But it is possible, would you not agree, that somebody might want to take the test and if he came in that 10 per cent because of his emotional character or whatever it may be, he could fail the test. That would be possible, would it not? Then he would be excluded from the police force even though he had no criminal record and might be an excellent police officer.

Chief Welsh: But the tests are normally there--they do not stop there. The test goes on. The information is given back to the investigator, if you will, and then many of these things are verified. They would be verified by other means. As I see the polygraph and the test, it is only a lead. It is an assist. It gives us a direction in which to go.

Mr. Swart: I have sat as a member on a small police commission. I know the degree of examination that is done with regard to applicants. I want to suggest to you it is such, with the number of applicants there are, that if somebody failed the polygraph test--we did not have those--the likelihood of that person being considered any further would be very remote.

Unless you can show me instances where somebody has failed the polygraph test and still been hired, I will be convinced no one is hired if he fails that polygraph test. Am I wrong?

Chief Welsh: I simply cannot do that because I have not asked or posed the same question to these other forces. But I think your question is valid and I propose to find out. We cannot answer it because we do not do it. We have not been doing it.

Mr. Swart: Then there is the other situation you mention here, where somebody refuses to take it. Are you aware of anybody in any of these other police forces who has refused to take the polygraph test who has still been hired? That is where they use the polygraph screening as a normal procedure in hiring.

Chief Welsh: No, I do not.

Mr. Swart: You do not know that.

Chief Welsh: No.

Mr. Swart: I think you would agree, would you not, that the likelihood of a police force hiring a person who had refused or had failed a polygraph test would be quite remote. That is the purpose of it. The screening is to reject those, and you state

further on in your brief that it has been an excellent tool and all kinds of people have been rejected under the polygraph test. It was found they could not pass it. It is not in those exact words but--

Chief Welsh: They had taken the test on their own volition. They had been asked and they had taken the test.

Mr. Swart: I just want to go back further to the line of questioning I had. I would like to ask the two or three members from the Peel Regional Police how many polygraph tests they take in a year. Do you have a polygraph operator?

Superintendent King: Yes, we do, if I can answer that for you, sir.

We were the first municipal force in Ontario to go into polygraphy. We commenced on September 22, 1976. Since that time our operators have conducted a total of 1,142 tests, which averages 180 plus per year. I have both operators here.

One thing I would like to highlight to you. Out of 1,142 tests, we have never had one complaint about the use of the polygraph, by members of the legal profession, members of the public or the people who took them. One thing I think should be really highlighted is that it is not always the suspect who is being put on the polygraph machine.

First, there are restrictions. We have policies. Most forces have very similar policies and very good policies about people who will not be given polygraph tests; for example, someone pregnant, someone under the influence of drugs or alcohol, or someone with a history of mental disorder, or under care for heart disease and taking medication. There are a number of restrictions such as these. The polygraph is only used--I do not like to say as a last resort--after the normal investigative methods have been conducted. In other words, a person is not brought in as a suspect and taken right to the polygraph operator. We have trained detectives, as you are aware.

It is usually used in major crimes, where homicide squads have done an investigation and come up with no alternative. In many cases--and I have some selective ones here, if you would like to hear some of the examples. For example, where females have been raped, they have begged us to take the test so they could prove they were raped, because there was no other forensic evidence that supported them. It was doubtful at the time, during the initial investigation, but after taking the polygraph--which indicated, yes, in fact, they were truthful--we have gone on and arrested people. Two young girls in our area were raped 12 times by three different people.

We also have had many murders. When our polygraph operators were the only ones in the province, they were directly responsible for the verification and confessions of 10 murderers in the province, in cases that had nothing to do with Peel Regional Police investigations. Those people are at present behind bars.

What alternative would we have had if we had not that? And there have been many other times, when we had major investigations. Of course, we also have people coming and virtually saying: "I am caught in a situation. I am suspected within my own company, and you have a major investigation going on. I want to take the test."

Mr. Swart: I would like to go back to the number of tests, approximately 180 a year. Have these been fairly static, year by year, since you have had the equipment and the operator, or are they increasing or decreasing year by year? What are the figures year by year, roughly.

Detective Sergeant Thomas: On the average they have been increasing by about 10 per cent a year.

Mr. Swart: Is that about the same percentage as the increase in crime, would you say, or greater or less?

Detective Sergeant Thomas: When we began the program the officers were not aware of what it could do. As they became more aware, they tended to use it more. As the other departments obtained their own examiners, the tests we were doing for other departments tended not to be as plentiful, but the increase in our own department took up the slack. It fluctuates from year to year, but on average I would say there is about a 10 per cent a year increase.

Mr. Swart: Thank you. Just one other question, Superintendent King. You mentioned that it is not just suspects who take the lie detector tests. I understand there are requests from women who have been raped and so on. Do you request people who are not suspects to take the lie detector test? Do you initiate that?

Superintendent King: We offer it to them. For example, sometimes we have witnesses whose indication to us may or may not be able to be substantiated. As well, we have victims in indications of reported offences that may not be that, but could be public mischief, and suspects. When the investigators conclude they can draw no definite conclusion one way or the other, and if people request it, either with their lawyer or without their lawyer, and would like to have the opportunity of taking the test, then yes, we indicate that it is available.

12:20 p.m.

Mr. Swart: It is available, but do you actually request them? Do you say to those people who are not themselves suspects, "We want to verify your evidence through the polygraph machine. Will you take the test?"

Superintendent King: Yes, in some cases we ask them that.

Mr. Swart: It is getting pretty broad use. Could you tell me the number of tests you take for outside forces? I gather

you are not taking as many now as you used to, but what percentage of those 1,142 would have been taken for forces other than your own?

Superintendent King: Off the top of my head, probably about 20 to 25.

Mr. Swart: Very low numbers. Thank you.

Mr. Stevenson: I just want to follow up and ask a question--I really do not care to have an answer--on something Mr. Swart was saying.

We have been expressing concern about the use of polygraphs for screening purposes. I support that in general, but when you come to the situation where you are screening for possible police officers, it may be worth some more thought. The question here is the 10 per cent or so, whatever the number is--I am not sure it is all that critical--where you cannot be sure. That does not necessarily mean you have made a wrong judgement. It is just that you are not prepared to make a judgement, as I understand it, in some cases.

One of the most common reasons that has been stated here in our hearings for the unwillingness to make a judgement is a stress reaction to the testing. In the case of a police officer, that warrants another question: What is the significance of that in the officer's future job, if he is responding to stress during a polygraph test? Is there any indication that officer is going to react in a stressful way when he is put into some other situation, if he is hired and goes into police work? When it came up for discussion, it made me wonder whether you want a person who reacts in that manner in the job of a police officer.

Mr. Swart: That is farfetched. It does not mean that because he fails a polygraph, somehow or other he has some emotional problem--

Mr. MacQuarrie: If the polygraph registers physiological reactions to stress, and for that reason, using your term, he "fails"--I do not know what passing or failing means--because he is very nervous or hypernervous, surely you would not want him as a police officer.

Mr. Swart: Some people work better under stress.

Mr. Chairman: Gentlemen, I think you are straying a bit.

Mr. Mackenzie: He might have a lot more feeling in terms of the people he is going to be dealing with and so on.

Mr. Stevenson: I was not suggesting there was a direct relationship. I was just asking the question.

Mr. Mackenzie: You could get an argument either way.

Mr. Chairman: Thank you, gentlemen. We seem to be straying a bit. I have a brief question to the chief, basically about internal investigations. How effective do you think the

polygraph would be to help you as a tool if you had a problem within your own department?

Chief Welsh: Providing the member would submit to it, he would certainly be well aware of all the rules of evidence and all the rules, that he would not have to take it if he did not wish to.

In view of the kinds of results that Peel regional police and others have been getting, if we were at a dead end with respect to the investigation and we did not feel any more evidence could be found at that time, I hope we would ask the individual to undergo a test. Here again, if he did not, that is the end of the ball game.

Mr. Chairman: Thank you, gentlemen, for appearing in front of the committee. We have one more group. Thank you once again.

Mr. Gillies: May I ask a very brief question to the chief? On the basis of your experience as a chief of police, one of the witnesses last week suggested to the committee that when a company reports to a police department that it feels it has an internal theft situation, it finds it is very difficult to get the police to investigate such circumstances. Has that been your experience?

Chief Welsh: That certainly has not been my experience. If they want us to go into their firm and just screen everybody, give them all a test, we would not have any part of it. The only manner in which we would go into that firm would be if they had a complaint of theft, registered the complaint of theft and we took the report. We would investigate. If it led to this kind of testing, well and good, but on a request basis there is no way we would.

We would not refuse to do any investigation whatsoever. If any individual said he had a problem, he had a complaint, we would investigate, but not on the understanding that if we find something out we are not going to lay charges. If we gather evidence, it is in our ball park and we would proceed.

Mr. Gillies: Certainly. Then once you had a suspect, as part of your regular investigation and under this legislation you would still, of course, have the polygraph tool as one of your investigative aids.

Chief Welsh: That is correct.

Detective Knox: I wonder if I can make a comment in regard to that. It is a policy in the Peel Regional Police that if there is an internal theft and a complaint is registered with the police--if there were to be, for example, a small company with eight employees and any one of those persons could have committed the theft--we will not test them just because of opportunity, because they had the opportunity to commit the theft; it must be more than that. In other words, we are not going to expect all eight people to come in and submit to a polygraph test. There has

to be reason to believe that a particular person may be responsible for that theft. We do not want fishing expeditions.

Mr. Gillies: Right, but as a matter of course, if you as a police department get a complaint of an internal theft situation, you investigate it.

Mr. MacQuarrie: I have one brief question to Chief Welsh. We have heard from the Peel representatives how the polygraph has been instrumental in assisting in the solution of some very serious crimes, quite a number of murders and other offences. How has it been in respect of your force in your experience in Ottawa?

Chief Welsh: We found it very good, and upon request we do it for other forces--Gloucester, Nepean and the like. It has been most successful. There is a very recent case, which I am afraid I cannot discuss at the moment.

Mr. MacQuarrie: You have found that they really work?

Chief Welsh: Yes, and they have as well because they are coming to us.

Mr. Chairman: Before I thank you again, Chief, are there any other questions? Thank you again, gentlemen, for appearing before the committee.

I apologize to the people from Leach and Garner for the scheduling mixup and I thank them for being so patient. I would ask them to come to the front, please.

For members' information, the Royal Canadian Mounted Police have accepted the committee's invitation to appear and will be here next week.

Will you please identify yourselves and proceed.

Mr. Pankew: My name is Ron Pankew, and this is Wagdi Bechera.

Mr. Chairman: Have you a written brief or is it oral?

Mr. Pankew: Yes. I have distributed it.

Mr. Chairman: Right. It is being distributed. You can please proceed.

Mr. Pankew: I will not read it, assuming that everyone can read the words.

I am frankly surprised at some of the things I hear and see here. I was under the opinion we were fairly interested in things like honesty, integrity and reliability, and that honesty versus distrust, trust versus mistrust, from a philosophical point of view. My company's image as an honest, hardworking and reliable company is at stake if we run the gauntlet of having losses and thefts occur on our premises.

12:30 p.m.

I sort of briefly argued in my paper on the moral, ethical, professional and legal uses of the instruments that are being questioned here. I am not technically informed and I do not have any statistics regarding the use, misuse or abuse of the machines as they exist today. I presume that, in effect, those things are occurring.

I want to talk about something historical in addition to this paper. If I understand history correctly, kings have been interested in seeking the truth, and queens, judges, men and women from all walks of life. That means the plain and simple truth. As a member of a company, this is what I am after too.

In earlier times people have written about things such as the truth. Children read about it from stories like Pinocchio. If you tell a lie, your nose grows. This is a type of detecting a lie. Children are concerned in fairy tales about the truth and the matter it plays in our lives. People watch movies and read books about people like Anton Mesmer who hypnotized people to tell the truth. Children watch Wonder Woman with her lasso which makes people tell the truth.

My company is also concerned about the truth. We have a large inventory of precious metal. Quite simply, we want to protect the integrity of that precious metal and the integrity of the people who work for us. We view the community around us and we have sought professional people to aid us in this objective.

In my opinion and my own preference in the use of these machines, they are detecting the truth. If I had Wonder Woman's lasso or Pinocchio's nose trick, I would probably go for them also. I chose the audio stress analysis as a professional person dealing in an area that requires truth and the integrity of personnel and property.

I really do not know what else to tell you. It has been valuable to us. In my paper I speak of deterrence and things like this. I think we have gone past Mesmer, Pinocchio and Wonder Woman with technology. If it is available, if it is regulated, if the people who use it are professional, then I as a customer will continue to use it unless it becomes illegal for me to do so. Other than this, I have nothing to add to the paper.

I would like to go to my last point when I talk about moral, ethical, professional and legal. It has been my experience in the professional area because of the high calibre and consistent performance of--I say polygrapher and ASA operators. I am new using ASA, and a man whose judgement and professionalism I regard highly offers a service to me that I pay for and I value. I also say it is important to me to see that this service, whether it exists or something new comes along, is offered to me to maintain the integrity of the work site for myself as an employee and, in so doing, maintain the image of the company I represent.

Mr. Mancini: This is a difficult piece of legislation. I do not know why the gentleman is particularly surprised at what he has seen or heard. Unless the members of the Legislature probe as much as they can in all directions they can, we are certainly not going to be doing our job properly. I am not too concerned if anything was said or done that might have offended this person. We certainly have to delve into all the possibilities. We certainly have to take a wide-ranging view of what this piece of legislation can or will do.

I am continually faced with the problem of witnesses who keep coming before us and saying these stress analysis tests, these lie detector tests, for the use of a better word--I guess I should not use the words "lie detector"--these polygraph tests are accurate, they have been proven to be accurate, etc.

There has not been a single witness, including yourself, sir, who has been able to prove this to me and maybe to others. On what basis do you tell us these tests are accurate? You have not been able to give us a reasonable response to the fact that people who claim to be knowledgeable and experienced in this field say there is an accuracy range, whatever that word means, of anywhere between 70 per cent and over 90 per cent.

These are significant problems we have to face. While you and maybe other groups feel this is a tremendous aid in you in being able to conduct your business, we have to be concerned for the people who might be caught in the crossfire of these tests and these analyses, who may, for one reason or another--when we talk about 70 per cent accuracy, we are down to possibly indicating that 30 per cent of the people tested might be wrongfully accused of something. That is a very significant group of people, a large group of people.

We need more help from you and these other organizations that have come before us. We need help so that we can grapple with the questions I have put to you. The fact that you say the tests have proved helpful is not enough. You have to tell us how you came to these conclusions, what body of information you used, what statistical findings you used. This is the purpose of all these hearings.

Mr. Pankew: Is that a question?

Mr. Mancini: Yes, it is a very general question.

Mr. Pankew: I think I can play with an answer to that. I view it as an aid or a helpful tool in conducting interviews of people in certain areas. My area of concern, of course, may be small. What it does for me is to indicate to me whether something is occurring that should not occur. Let us say I interview someone. I have heard people talk here about a stressful situation and whether under 10 per cent of these people who appear before people who are examining them with these machines and so on--I will take that into consideration. It is a tool to gain the truth.

If I had a better or more consistent tool--I do not know how consistent or inconsistent these tools are. I can quote statistics

other people have written, although I have not conducted a test myself on the use or misuse of this machine or its accuracy or inaccuracy. If I go on and on to talk about these things, I really think the question in my mind is the honesty and integrity of the people who work for me and with me in my place of business. In my opinion, I consider this tool to be an effective aid. In my opening remarks, I said I am not prepared with statistics. I am not concerned about those things. I am concerned that it may have an effect on my place of employment in terms of the integrity of--

Mr. Mancini: You are telling us you believe this mechanism is useful but you are not really sure why it is useful. You have been told it is useful and on that basis you are prepared to go along with it.

12:40 p.m.

Mr. Pankew: Not entirely; that would mean I was completely naïve. I do not think I am. What I am saying is that consistently over time, when certain things have occurred and the instrument has come into play, it has effectively guided investigators and employers into areas that have led to the apprehension and eventual conviction of someone who actually did commit a crime.

A loss to me is a serious thing. It is money out of my pocket. It is money out of your pocket. Crime is a thing one should be concerned with. I have read the documentation on this device. I cannot attest to its accuracy. I could write anything I wanted. In fact, I did in my brief. I can also say what I like as long as I am not slanderous.

In my opinion as a customer, it serves a useful purpose in the community in which I work. What is the alternative? What do I do to protect the precious commodity I have, which is in millions of dollars? How do I prevent it from (inaudible), resulting in a substantial loss to myself and the company?

What else do I do? What alternatives do I have? I do not have any alternatives. I really do not. You are saying, I gather from your questioning, that you oppose these things on certain grounds.

Mr. Mancini: No, I said I support Bill 68 in its present form basically.

Mr. Stevenson: I take it in your business you are a competitor with Engelhard and Johnson Matthey and that group.

Mr. Pankew: Yes.

Mr. Stevenson: Of course, they were in. I assume you are aware of that. I think they received a reasonably favourable hearing in the committee. You have gone through a sort of philosophical presentation here. Could you tell the committee exactly how you use the machine? Is it a random check? Is it used on everyone who works for your company or just people in a certain area? Could you tell us the procedure and how you use it?

Mr. Pankew: What occurs is we have a random diary system that we use. It is a card system. Basically, everyone would be examined at least twice a year on our loss prevention program. Those involved with keeping the keys and protecting the product are randomly selected on a three-month basis. They would be done four times a year.

The interviews are conducted in a pleasant, quiet atmosphere in a room with the operator of the ASA. Everyone is asked if they would like to submit to these things. I have had no one refuse. I suppose one would say that if they refuse they are going to be tossed out the door.

However, I must say one thing. There was a thief. I have hired an admitted thief. When I interviewed him for the job initially, he did not respond saying, "Yes, I am a thief and I have come to work in the place where you store all this gold."

Mr. Stevenson: Can I interrupt for a minute? When you say a thief, are you talking about a person with a record?

Mr. Pankew: Yes. He was convicted of theft. When we conducted the test, obviously he was nervous, and I told him: "Whatever you do, all I ask is that you tell the truth. If you have admitted something to me, that does not matter. I ask that you tell the truth." He then explains that he did steal and he was convicted of stealing. He comes to me and explains the situation in his own words and says, "Yes, I did this theft." I said, "I suppose you are not going to do it again," and, of course that is the answer. So we go into a long chat back and forth.

In my experience interviewing people I make a judgement on their future honesty and integrity. I made that judgement and I hired him.

Mr. Stevenson: Have you an agreement? Are your employees unionized?

Mr. Pankew: No, they are not.

Mr. Stevenson: One of the previous companies did have it written into the collective agreement that this sort of procedure would be carried out. Do you have some similar sort of agreement? Do your employees know precisely what the rules are going to be?

Mr. Pankew: Yes. I explain all that quite clearly. That is the very first topic I touch on. I have had no one refuse to go through all the various steps to eventual employment. I myself went through those very steps. I was asked to and I felt: "Why not? It establishes my integrity." I felt good about that myself.

Mr. Stevenson: Have you had a situation where you would use this instrument as an investigative tool as opposed to a deterrent tool in your own company?

Mr. Pankew: No, we have not used it as an investigative tool at all, only as a deterrent. There have been instances where

people have approached me and asked for the test because they were accused of not doing some job, or somebody wanted to set the record straight that he told somebody something and he did not believe him, and I have said no. One secretary came to me and spoke to me about the use of this machine. She said: "If somebody stole something from here, I would like you to know right off the bat that I was not under suspicion, so I would ask for the test immediately."

You have to understand that it is the psychology of the business. We handle millions of dollars daily. It is not like copper wire or aluminum wire; perhaps it will be gold wire. You make little buttons and beads. It is not copper or brass or aluminum; it is gold, and gold is a valuable commodity. Take a 400-ounce bar at \$500 Canadian per ounce. Figure it out.

Mr. Stevenson: Is the only other real alternative to this sort of thing a strip search? Is there anything else that is somewhat more dignified and easier to administer?

Mr. Pankew: I have other devices. What I rely mostly on is the integrity of the employee, if someone sees or hears or talks to someone who is stealing or if someone says he stole things. My biggest thrust into loss prevention is the confidence I place in the people who work with me.

Mr. Stevenson: Have you had a significant loss since this device was put in?

Mr. Pankew: I have had no losses. As I say, I am careful. I am in personnel and I interview everyone and I am very, very careful about whom I employ. I realize that if I was to hire someone who had the ulterior motive of robbing me, that would place me and everyone in the complex in jeopardy. Their lives would be at stake. People will kill for small amounts of money, \$10, \$20, \$30, 10 cents, 50 cents. What would they do for \$50 million?

12:50 p.m.

Mr. Stevenson: Prior to the use of this device, had you any problem with theft? Is this a new thing you are relying on? What was your procedure prior to using it?

Mr. Pankew: When I organized the entire security system and the employment procedure, I built in all these mechanisms at the very beginning and I have not had any losses.

Mr. Swart: I will be very brief. I recognize, of course, the need for security in an operation such as you have. My understanding is you use the screening process, whether it is polygraph or ASA, in the hiring of people, as well as in the ongoing operation.

Mr. Pankew: Yes.

Mr. Swart: And you state it is a very effective aid.

Mr. Pankew: I have no doubt of that.

Mr. Swart: From your point of view, it is a very effective aid. Would you agree with me that it gets down to the issue that the need for security, as you see it, in your company is so great that even though this may be discriminatory in hiring, recognizing that the effectiveness of the screening may be only 90 per cent or even 75 per cent, it is so important to have that security that you are willing to accept the injustice of people who may be excluded because of the absolute need for security?

Mr. Pankew: I am not following your question.

Mr. Swart: If you have applicants for a position who go through the screening process and they are rejected because they do not pass the polygraph, which is 90 per cent correct or 85 per cent correct or whatever it may be, there will be some who will be excluded who may very well be honest and reliable employees. You are willing to run that risk, have that injustice, if you will, against a minority who are excluded because of the high need for security you have in the plant?

Mr. Pankew: You are asking me if I place my total faith and trust in that machine. No, I do not. I do not place that in my car, in my washing machine, my dishwasher, my microwave oven or anything like that. I do not place my entire trust in that machine. It is an effective way of telling me something. It would not have the final say in anything I ever did.

Mr. Swart: It would have a very real bearing on whether you hire a person or not.

Mr. Pankew: It would make me get to the bottom of why this machine told me these sorts of things. It would tell me that I should talk to that person a little longer, explain to them exactly and precisely what occurred, then I would sit very patiently and listen to anything they had to tell me regarding those results.

In my opinion, there is not a pass and fail in this. You do not fail a lie detector test; you do not pass a lie detector test. This machine indicates something to me and I would pursue that. Without it, I would not get this indication. I would have to use my own judgement to come to conclusions about whether a man was telling me the truth or not. I have talked about Pinocchio's nose and Mesmer's hypnosis and Wonder Woman's lasso. I hope we have done something more than that in technology today.

Mr. Swart: What this committee has to decide, and ultimately the government will have to decide, is between invasion of privacy and tests that may be inaccurate, exclusion of people through a system which is not 100 per cent accurate, versus the need for security. That is a pretty difficult decision to make on where you draw that line.

Mr. Pankew: I understand your dilemma. I do not know of anything that is 100 per cent accurate.

Mr. Swart: But if you get an education, for instance, if you get a certificate from high school or a university degree, that is pretty close to 100 per cent accurate. There are a great many others. There are the ages of the employees. Most of it is much more accurate than 90 per cent or 85 per cent of the factors you would be considering.

Mr. Pankew: I will not argue that. What I would like to say is you are touching on accuracy and that really tells me something, that you are looking at a professional user making a professional judgement regarding what his machine tells him. Is he going to be more or less accurate than anyone else who plays with that machine? Of course he is. I do not know whether I would be able to use the machine and have it tell me I was being accurate in my judgement, using it as an aid to me in making that judgement regarding what someone is telling me. I cannot answer that. I suppose a professional person whose business it is to be completely informed about this machine would be able to give you an accurate answer regarding his outcome.

My decision at the end of his report to me would say: "Is that guy in that 10, 15 or 20 per cent? Is this guy in here to do something terrible? Is he going to rob me, kidnap me or kill me? What is he going to do?" Then I would ask this man these questions. If I am not satisfied on what he tells me after this, then I am going to have to make a value judgement regarding his employability or whether I call the police on the spot and say, "Listen, we have a person here you should talk to."

Mr. Gillies: Talking about technology, Mr. Pankew, I was a little bothered or concerned that you felt there was no alternative available to you--I think you used those words--in terms of the security of your operation. I wanted to ask you if, in fact, you use metal detectors?

Mr. Pankew: Yes, I do.

Mr. Gillies: We had a demonstration here in committee last week of a small hand-held metal detector that was not very sensitive, but you know there are detectors on the market now--

Mr. Pankew: Yes.

Mr. Gillies: --that can detect even minute amounts of metal secreted in the body and can even differentiate between precious and nonprecious metals. I assume you use that type of technology.

Mr. Pankew: I have the Garrett which is, after trial and error and many talks with salesmen, not that truthful.

Mr. Gillies: I used to be one.

Mr. Pankew: I wish I had Pinocchio's fairy wand type of thing at times. They describe these devices to you and they say they are going to do all sorts of wonderful things. They do not. If you wanted to take metal out of my place, you could. There are

all sorts of deterrents and little games people play to protect the integrity of their product. We have a random selector. We have a metal detection arch, a mark 10, which is supposedly an effective tool. Johnson Matthey has the very same, so does Engelhard and so does Sovereign Jewellery. Word travels in the industry that this is a good device. Others have dumped theirs and bought new ones.

I have gone along and talked to my peers in the business. They have advised me, and whose word I have taken over others, to go with this particular metal detection arch. It says ferrous, nonferrous metals adjusted to this level, adjusted to that level, but it does not tell you the atmospheric pressure, air temperature, body weight, what you ate, where you ate, who you are, what you are, whether you walk closer to one side or the other, whether the walkway vibrates or whether you cough, sneeze, wiggle or stop momentarily, and that affects the reading on the metal detection arch. They do not tell you all those sorts of things, but you find out through trial and error that this device is not exactly what it is cut out to be.

Could I take a piece of metal through there? Yes, I could. I catch people doing that. They do not want to take their rings off, so to speak, so they toss one hand over the other. Of course, it will not read that. If you took 15 grams of gold out a day at what--10 carat is roughly \$10 or \$8 and 14 carat is \$11--and you kept doing this consistently over time, or let's say you bought in a silver ring, putting it in a silver batch, and took out a nice solid gold one, over the year you would have a lot of gold and we would have a lot of silver. Silver is \$8.50 American; gold is \$379. You come in with a metal zipper and you lace wire in your zipper. You feed metal in through the soles of your boots or you swallow it.

Gold is a funny little thing. It does not matter what you do with it; it always comes back. You can melt it, dissolve it, make salt out of it, make solutions out of it, you can do everything to it; but if you precipitate the solution, the gold is left, exactly what you put in. If you burn it when it is mixed with all sorts of stuff, the copper leaves it, the lead leaves it, everything leaves it, and what comes trickling out is gold. That is the thing we are working with. This beautiful, devilish, tangerine-coloured metal is the object of all my effort. I am hired to prevent these sorts of things.

Mr. Gillies: I appreciate your security problems. I hope you can understand, though, that we are faced with many of the same problems in terms of the circumstances and the way the technology is used with the lie detector machines as you described with metal detectors.

Just an interesting point, did you know the Royal Canadian Mint does not use lie detectors in any aspect of its operation?

Mr. Pankew: I understand that, but the Royal Canadian Mint has a lot of money, guards, guns, walls, bars and gates. I do not have the resources it has.

Mr. MacQuarrie: They do do some strip searches.

Mr. Pankew: Fine. I personally would not like to conduct a strip search, whether it is surface or deep.

Mr. Chairman: Thank you, gentlemen, for being here. You were here earlier in the morning and we appreciate the half a day off and your staying with us to give us your presentation. We certainly valued it very much.

Mr. Pankew: I just have one point. Mr. Wagdi Bechera, who is a friend and co-worker of mine, is employed in an area other than mine. I am in security and personnel obviously. Wagdi Bechera works on the floor in the melt room where he takes scrap and extrudes gold from it.

I asked him to come along with me for two reasons, because he is local and because he probably has the most independent mind in the place, and I respect that. I do not know what he will say or what he would like to say. I have not rehearsed anything with him. I thought he might give a perspective from an employee's point of view rather than a personnel manager's security. I truthfully mean this. No matter what he says, he will always work there for as long as he cares to stay. Whether he is pro or anti, that is his opinion.

Mr. Chairman: Agreed, that would be fine. Please proceed, sir.

Mr. Mackenzie: Could we have some indication as to how long it will be? Some of us want to hear this kind of testimony but there is also, for some of us, a meeting at one o'clock. I know there is for me and for my colleague. That is why he had to leave. It is a little difficult when we go half an hour over the time frame that was set by the committee, when we have made arrangements for meetings.

Mr. Chairman: Could you give us an indication, sir?

Mr. Mancini: Mr. Mackenzie is already on the record anyway so--

Mr. Chairman: Before we start, we have a little bit of a problem. I know Mr. Mackenzie is trying to be co-operative. Maybe I should get into it now. The committee has a little bit of a problem. The House leaders have requested clarification from this committee.

The Labour estimates are scheduled to begin next Wednesday morning in the general government committee. The justice committee will definitely meet as scheduled on Bill 68. Is there any possibility that the Labour critics of the opposition parties would agree to have the Labour estimates proceed in the morning, possibly by asking the members of their parties to substitute for them on this committee? I leave that with the committee.

Mr. Mancini: Mr. Chairman, I would be prepared to take part in the Labour estimates in the morning and then proceed with the work of this committee in the afternoon.

Mr. Chairman: We only meet in the mornings.

Mr. Mancini: You are asking us to give up the most important part of the debate on this bill. I don't think I can agree to that. I want to be as co-operative as possible. You are asking us to sit all Wednesday morning, and I am willing to sit all Wednesday afternoon. I think that is quite a concession. I have a lot of things to do also. I do not see why the committee members--

Mr. Stevenson: Do you have any objection to sitting afternoons?

Mr. Chairman: First of all, we are not allowed to. Maybe an alternative is we should give it back to the House leaders and let them sort it out. Would that be agreeable?

Mr. Mackenzie: It would be agreeable. My only concern will be whether or not my colleague is here. If he is, then we will substitute somebody for myself because the Labour estimates will take precedence on that day.

Mr. Chairman: Thank you. Would you proceed, sir and give us an indication of how long you would be.

Mr. Bechera: I will try to make it as short as possible.

Mr. Pankew was asking me to come here and say whatever I feel about the tests. With a company like our company, we are working with a great deal of precious metal. Usually, when we go out of the building every day, we have to go through the detector. We have a little button to push. On that little button there are two lights, a green and red. Just an automatic thing happens every time you push the button--either the green or the red. If we have the red, there is a little scan.

With the procedure of going through that detector and scan every day, it does not really hurt me much. We go through that test every three months. It is exactly the same thing to me. Basically, we want to protect what we are working with. What we are working with is very precious. I can say if I want to take something out, I could. There are lots of ways to play with it.

The thing is that if I am honest enough to feel this is to protect the material I am working with, I do not see why we do not do it. It is just as simple as that. We go through that detector every day, so why do we not take a small test of 10 minutes every three months? I do not see any harm in it. That is all.

Mr. Chairman: Thank you both for appearing. We certainly appreciate your understanding of the problems we have had on the committee. The meeting will be adjourned until next Wednesday at 10 a.m.

The committee adjourned at 1:07 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CENTRAL TRUST COMPANY ACT

WEDNESDAY, NOVEMBER 23, 1983



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Kolyn, A. (Lakeshore PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
Breithaupt, J. R. (Kitchener L)
Elston, M. J. (Huron-Bruce L)
Eves, E. L. (Parry Sound PC)
Gillies, P. A. (Brantford PC)
MacQuarrie, R. W. (Carleton East PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)
Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Boudria, D. (Prescott-Russell L) for Mr. Spensieri
Harris, M. D. (Nipissing PC) for Mr. Taylor
Hodgson, W. (York North PC) for Mr. Stevenson

Also taking part:

Elgie, Hon. R. G., Minister of Consumer and Commercial Relations
(York East PC)

Clerk: Arnott, D.

From the Ministry of Consumer and Commercial Relations:

Crosbie, D. A., Deputy Minister
Thompson, M. A., Superintendent of Insurance, Financial
Institutions Division; Registrar of Loan and Trust
Corporations

Witnesses:

From Crown Trust Preferred Shareholders:

Chittenden, R. F., Member, Management Committee
King, C. W., President, Hughes King and Co.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, November 23, 1983

The committee met at 10:07 a.m. in room 151.

CROWN TRUST COMPANY ACT

Mr. Chairman: I see a quorum. We are here to deal with Bill 97, An Act respecting Central Trust Company and Crown Trust Company. Mr. Minister, have you any comments?

Hon. Mr. Elgie: No, Mr. Chairman, except that, for the record, I might just read the purpose of the bill and then you might proceed with the agenda as the committee has determined to do.

The purpose of this act is to provide for the transfer of the trusteeship and agency business of Crown Trust Co., to Central Trust Co., so that rights and obligations of those who have relations with Crown Trust Co., and Central Trust Co. with respect to that trusteeship and agency business may be clearly determined.

I made an extensive statement on second reading of the bill, so I have no further comments.

Mr. Chairman: Thank you, Mr. Minister. the first witness will be C. Wallis King, president Hughes King and Co., representing Crown Trust preferred shareholders. Mr. King, would you please come forward?

Mr. King: Mr. Chairman, my name is C. W. King. I am here also with counsel for the preferred shareholders and I would appreciate, with your indulgence, if he could sit with me.

Mr. Chairman: We agree.

Mr. King: Mr. John Finley of the law firm of Smith Lyons Torrance Stevenson and Mayer.

Mr. Chairman: You may proceed sir.

10:10 a.m.

Mr. King: Thank you Mr. Chairman. As I said, my name is C. W. King. I am president of Hughes King and Co. Ltd., financial consultants and investment counsel. We have been representing 535 registered shareholders holding 265,000 series A preference shares and 1,823 shareholders holding 691,633 series B shares. Because of multiple holdings in nominee name, I would estimate the total number of shareholders unofficially owning preference shares would be about 4,000.

In monetary terms, the series A shares total a par value of \$5,300,000, the series B total a par value of \$13,832,000, for a

combined total of \$19,132,660. As you know, the shares of both Series A and B were publicly listed and traded on the Toronto Stock Exchange at the time of the seizure by the Ontario government on January 7.

The last listed traded value of the shares as of January 7, 1983, was \$3,643,750 for series A and \$15,215,926 for series B, for a total listed traded value, that is market value, of \$18,859,676.

As you are also aware, no dividends have been paid on either series A or B preference shares since the time of the seizure. The present arrears aggregate \$1,852,042, which of course represents a further loss to the preference shareholders.

Since the time of the seizure, I and our staff have had numerous communications from the shareholders. I must advise you that by far the majority of them are elderly and their investment represents life savings, hard earned and saved during an inflationary period when it was not easy. They invested in these preference shares with a now questionable peace of mind, believing that as the issuing prospectus states, the Crown Trust "operations are subject to inspection and supervision by the registrar."

They had every reason to believe their investment was secure. Certainly after Re-Mor and Astra collapsed several years ago, these shareholders had reason to think that the government's inspection and supervision of these regulated companies would be more thorough and efficient. Indeed, the present minister's predecessor gave public assurances that steps had been taken to prevent a recurrence of such financial difficulties.

Since January 7, our firm has made vigorous efforts to arrive at a business solution. There has been some serious interest but we have received no support or encouragement from the government and these efforts have been unsuccessful. However, we are here to address ourselves to Bill 97, which this committee is considering.

As I understand it, this bill stems from the provisions made by the government regarding the ETA--estate, trust and agency--business of Crown Trust and the agency and operating agreement with Central Trust. We did not have an opportunity to examine this document until some weeks after our last visit to this committee on January 31.

In that agreement, it provides for Crown Trust to earn five per cent on the revenues collected by Central Trust on the Crown Trust ETA business. We further understand that at December 31, 1981, these revenues total approximately \$11 million. At five per cent, this would represent an income to Crown Trust of about \$550,000 per year during the life of the agency agreement. This represents a return of about five per cent on an income stream of \$11 million. Certainly it is hardly adequate in this day and age.

The bill contemplates, as the minister has just said, transferring the ETA business to Central Trust and while presumably the five per cent provision will be received by Crown

Trust for the five-year lifetime of the agreement with Central Trust, there appears to be no consideration for the value of the ongoing ETA business after the termination of the agreement. I am not aware of ETA business being sold in recent times, but regrettably only a handful of trust companies seek this kind of business, no doubt due to the longer-term horizon required in developing competent staff and acquiring the business itself. But I must advise you that it is a valuable asset which contributes to the bread and butter of the major companies in this industry.

Certainly, if I had to speculate, a price of two times revenues would not be out of line. In this case, \$22 million would be cheap when one considers the ETA business of Crown Trust having an asset base of about \$1 billion and an experienced staff already in place.

To train and develop an experienced trust officer imbued with a sense of integrity, in my experience takes five to 10 years. It took Crown Trust about 85 years to develop this business into \$1 billion. Certainly Central Trust is acquiring a book of business and, equally important, a staff that would be the envy of the industry. Bluntly speaking, it is a giveaway.

This leads me to the lack of consideration and attention that the preference shareholders have received. The Crown Life-Extendicare offer, for example, made last January would have seen to the good standing of the preference shareholders.

I would like to refer to a memorandum of interest dated January 12, 1983. If I may summarize it. Is this memorandum before your committee?

Mr. Chairman: Do you want to table any documents?

Mr. King: May I have your direction as to how that is done?

Mr. Chairman: The clerk could make copies and distribute them to the members.

Mr. King: I will summarize it and then give it to you. It is a memorandum of intent concerning Crown Trust signed by Crown Financial Services Inc., Mr. Ben Hutzler, vice-president. It says, "CFSI shall purchase from Greymac all of the outstanding shares of Crown beneficially owned by it for \$25 million payable by certified cheque" etc.

"On closing, Greymac shall purchase from Crown (payable by certified cheque) \$25 million of the Cadillac Fairview mortgage portfolio." It goes on to undertake to pay the balance of the common shareholders at \$62 a share, and that is subject, of course, to the approval of the department and so forth. Has that been tabled?

Clerk of the Committee: Yes.

Mr. King: I would also like to refer to a response by Greymac Credit Corp. dated January 18. Again, "The purchase price

shall be \$23,750,000." It goes on to detail adjustments and so forth. "We agree that on closing the transaction contemplated hereby, we will purchase from Crown the loans," and so on. "On closing we shall deliver to you all the share certificates," etc. It is a typical response to an offer.

Also I would like to table a letter dated January 20, 1983, addressed to our minister. It is a letter signed by Mr. Ian W. Outerbridge. It says:

"Further to our letter of today's date, we have now confirmed with our client and several potential purchasers that you and your ministry are indeed responsible for obstructing the sale of Crown Trust by the imposition of terms and conditions which make it impossible.

"Our client is advised as well that you have discouraged potential purchasers from dealing with us and have imposed terms that make any sale uneconomic to either a potential purchaser or ourselves. In short, you appear to be acting unreasonably and in bad faith.

"The bad faith stems from your overt assertions both to our client and through your agents to our client and through the media that you were desirous of a sale. Be advised that not only have we negotiated with Extendicare and concluded a deal twice, but also with the Belzburgs and concluded a deal once, Cohen and Ellen and Triple 5.

"We are still prepared to sell but at this moment in time none of the prospective purchasers appear prepared to put their offers in writing for the stated fear that they will be embarrassed by your unwillingness to agree to the sale which by implication will reflect upon their acceptability as potential owners of trust companies in Ontario."

10:20 a.m.

Mr. Chairman: Mr. Finley, do you have anything to add to the presentation?

Mr. Finley: With respect to this point, I think it is important to bear in mind that what we are dealing with in these offers that Mr. King has referred to are purchases of the common shares with the result that Crown Life, an institution which is well known to everybody in this committee room, would have become the common shareholder of Crown Trust and would have left the preferred shareholders, the people we represent, in place as preferred shareholders, would have made a follow-up offer in accordance with the laws of this province to the common shareholders who had not received the \$62 a share that had been received by the vendors to Mr. Rosenberg, and the company would have gone forward as a well-run, well-managed company under the trust laws of this province.

These are the transactions that to the best of our knowledge, the facts being as meagre as they are, would have gone forward as a trust company that this province would have been

proud of and the preferred shareholders' interests would have been protected. But we have only now found out about this transaction. No one has ever told us about it; no one has ever publicly disclosed these offers were on the table.

Mr. Breithaupt: Mr. Chairman, I only wanted to inquire on one point. On these memorandums of intent that will be distributed to the committee, the first one was from Crown Financial Services to Greymac. That was the \$25 million. Let us say we call that document 1. The response, this proposal 2, was the \$23,750,000 negotiating reply, and then in that same week we have this letter that Mr. King has put in, the letter from Mr. Outerbridge. That was the particular sequence of those events.

Mr. Finley: That is as we understand it. We do have a problem that these facts are much better known to others than ourselves. We have only recently become aware of these facts. There are other people who could shed a lot more light on these things but to date have not.

Mr. Breithaupt: I just wanted to clarify that.

Mr. King: From all the statements made both publicly and privately by representatives of the government, and the facts, meagre as they are, which have been disclosed, it would appear to us that the transaction as consummated with Central Trust was motivated more by desire to punish Mr. Rosenberg and with no concern for the fact that the preferred shareholders would suffer as well, and by a desire on the part of the federal government to prop up a federal trust company that was experiencing serious liquidity problems. In short, the preferred shareholders were sacrificial lambs.

One can readily observe that simply no consideration was given to the plight of the preferred shareholders then and very little since. There has been no information communication with the preferred shareholders other than telling them there appears to be a capital deficiency and, therefore, no dividends will be paid. They have not had an audited statement since December 1981 or any financial information for 1983. There has been no progress report from the minister, not even a letter of sympathy.

Surely in a civilized society one can expect treatment from ministers of the crown that is compassionate, understanding and responsible. These preferred shareholders have invested indirectly in the productive capacity of this province and indeed Canada. Surely they are deserving of your attention and consideration. The evidence to date would suggest they are forgotten.

I would be pleased to respond to any questions you or your committee may have.

Mr. Chairman: Thank you Mr. King. Mr. Elgie, do you have any comments to make before the questions?

Hon. Mr. Elgie: I just have two or three points to make. Mr. King opened his remarks with some comments about Re-Mor Investment Management Corp. and Astra Trust Co. I would remind you that Astra was a federally incorporated trust company over which this registrar had no specific authority and indeed had not even issued certain powers that are reserved to the province to that trust company. Whatever powers they had were powers given them by the federal government.

Any comments by the minister at that time would not be related to Re-Mor.

He also commented on the adequacy of the sale price with respect to the estates, trusts and agencies accounts. Let me say that a number of bidders put proposals to a committee composed of representatives of the registrar as well as, naturally, Canada Deposit Insurance Corp. which was, and is, heavily involved in this. Those documents were tabled before the Legislature.

Indeed, at a sitting of this committee in late January, an amendment to the Crown Trust Company Act was specifically introduced, which gave certain rights to those who felt the registrar had not acted with prudence, good judgement and good faith in the management and disposition of the assets.

Can we refer for a moment to the various Extendicare Ltd. offers? I would remind you that far keeping you in the dark, I made a statement to the Legislature on January 17 in which I said: "For the advice and assistance of any parties who may be interested in acquiring the shares of any of those companies, and so that the public will know the position of the Ontario government, we have established the following basic conditions that must be satisfied by any agreement that may be reached.

"1. The Canada Deposit Insurance Corp. must approve of the transaction.

"2. Any arrangement must result in the trust company being left in an assured financial condition that fully protects depositors.

"3. The acquirer must be acceptable to the registrar and the Canada Deposit Insurance Corp. as one likely to maintain the trust company in an acceptable condition and to operate it in a manner that recognizes the fiduciary responsibility for public funds.

"4. The present owners of the trust company cannot receive any direct or indirect payment for their interests, unless no public moneys are used or placed at risk to support the financial position of a trust company and all depositors and all other creditors have been fully provided for.

"5. No waiver will be given by the province in respect of any existing or future legal responsibilities of any party that have arisen or may arise relative to these companies."

I think the position of the government with respect to those who wish to acquire the shares of the trust company were pretty clearly documented.

Finally, I would say that the company he referred to, Extendicare, did indeed place an offer with respect to the acquisition of the assets through an agency agreement. When the Crown Trust Company Act became law, that offer was tabled before the House. It was projected that over a five-year period the Extendicare offer would have yielded about \$2.5 million--you can correct me in this--to the creditors and other people such as preferred shareholders.

It was the opinion of those who were reviewing those proposals that the central proposal, which was thought could yield up to about \$20 million for the benefit of creditors and preferred shareholders, for example, was certainly a preferable one and an offer from a company that met the other criteria that were laid down and which remained in force.

With respect to your comment that no financial information has been made available, I think you have been informed on numerous occasions that Peat Marwick and Partners, who were the auditors, have been working on a report for the benefit of the shareholders. Although there has been some delay in getting that into your hands, it has nothing to do with us.

I am assured by the registrar that it should be forthcoming very shortly. To say that I as minister or any of my staff have had no interest or consideration with respect to the preferred shareholders is, with respect, an erroneous statement.

From this government's point of view, I think the registrar and the entire committee have had the preferred shareholders' interests very strongly in their minds in terms of the long-run recovery of capital so that the preferred shareholders, along with creditors, might benefit. I have said so in many letters to the preferred shareholders. I think it is inaccurate and, if I may say so, unkind to suggest that there has not been an interest shown in their problems, for which I have great sympathy.

10:30 a.m.

Mr. Chairman: Mr. Boudria, do you have some other comments?

Hon. Mr. Elgie: By the way, one might also add--and I do not say this critically because I think you have obligations on behalf of the shareholders as they have their own--there was litigation commenced against us, which I hope all would agree would make conversations with respect to certain matters a little more difficult.

I understand that action is now not proceeding and I understand that you do have other certain rights, as I mentioned, in the act, but we have no problem at all when no actions are under way or contemplated in any public way concerning that.

I would remind your solicitor that the knowledge with respect to the offer of Extendicare was in the newspapers at the time. It was no surprise to anybody.

Mr. Boudria: Mr. Chairman, if I can refer back to what Mr. Finley said, there are others who know more about these transactions than we do, referring to the documents you showed us this morning.

Mr. Chairman, the question is really perhaps to yourself and to all of us. I was led to believe we were going to try to get a representative of Crown Life to appear as a witness this morning, but he declined. Do you have any information on that?

Mr. Chairman: We were in contact with Mr. Payne but his schedule was too booked up and he could not accommodate us.

Mr. Boudria: Do we know if he tried to send another representative, or did he offer to? Did he just decline to send anyone?

Mr. Chairman: He just declined and said that he could not make it. He did not suggest sending anyone else.

The clerk informs me he did suggest another name.

Mr. Boudria: He did suggest another name.

Mr. MacQuarrie: Was Crown Life involved in it?

Hon. Mr. Elgie: Crown Life is owned by Extendicare. At a proposal put to the then major shareholder, Extendicare also had an offer with respect to the acquisition of the assets through arrangements outlined in the Crown Trust Company Act.

Mr. King: Mr. Chairman, I think you may now know that Crown Life is probably one of the top four financial institutions in North America. Extendicare is the fourth largest nursing home operator also in North America. They are companies of quite some substance.

Mr. Boudria: It seems that it would have been very useful for us to have had the benefit of the testimony of Mr. Payne this morning regarding the negotiations that took place to which he was a party. I feel it was very unfortunate he was unable to attend. I am wondering whether or not--the opportunity would probably not arise again--we could discuss these matters with Mr. Payne prior to the passage of Bill 97.

I think it would have been be a good idea perhaps even to have a Speaker's warrant issued or something so that we can have the benefit of his appearance with us.

Mr. Breithaupt: Mr. Chairman, I was interested in the comments Mr. King made concerning the amounts of money that are involved and the circumstances whereby some \$18 million of value for the preferred shareholders is clearly at some risk.

I recall Mr. King saying when he appeared before the committee on January 31 that as part of our discussions of Bill 215 empowering the sale of the company, he had made suggestions as to alternate solutions that would have been available to protect somewhat the preferred shareholders.

In the bill before us, if I understand Mr. King's view, the preferred shareholders may well prove to be the forgotten parties in this transaction and, depending on the valuation of various assets and their maturity and development, may have substantial loss.

Mr. King, could you review for us those particular alternatives now some nine months later and compare those alternatives with what you expect the results of this bill will be so far as your class of preferred shareholders is concerned?

Mr. King: There are several responses. One is that we did ask at the January 31 meeting if the government would consider a preferred shareholders' management committee. I suggested that a group of distinguished, experienced and knowledgeable businessmen could be put together quite readily to manage the company, much the way the Midland Bank, a foreign Canadian bank, was given that treatment as the preferred shareholders of Seaway Trust. That did not seem to be forthcoming.

Mr. Breithaupt: Why was that? Do you know?

Mr. King: I do not know, sir. It certainly seemed a reasonable request because I think we could have salvaged the ongoing entity in a situation. For example, if Mr. Rosenberg's shares at that transaction had gone through with Crown Life and Extencicare--I can see the minister's concern--if the proceeds had been placed in trust, pending litigation or whatever one does, the preferred shareholders would be now floating with a major institution in North America.

The management committee having gone by the boards and with such lack of information, it seemed that in the interest of these preferred shareholders who, as I said, are elderly, they just simply could not wait 10 years or 12 years to see if they might realize something. So I felt it was paramount to see if we could arrive at a business solution from a cost point of view because we were advised that, as the minister has suggested, we do have a remedy in the courts. I have been reluctant to pursue that to the hilt because we are talking roughly about \$1 million in legal costs.

As you can appreciate, this is not only time-consuming but simply they cannot afford that kind of commitment. With that background, I pursued the concept of creating a business solution whereby the so-called soft assets could be set aside and a

transaction done with an appropriate company whereby the company would buy or take over the continuance of the preferred shares in exchange for preferred shares of that company and, therefore, hold those Crown Trust preferred shares and the underlying asset which would be the soft assets. During those discussions with a number of parties, there was a great deal of interest. In fact they were more interested in the soft assets than the so-called hard assets.

The problem I ran into was correspondence with the Canada Deposit Insurance Corp. to remind me that they had a floating charge on everything and that they would not agree to such a transaction. My response to them was that I would trust they would respond to a business solution, to which I did not get a response.

There was a great deal of interest. I was not aware of the floating charge on all the assets from the insurance company, but this had been obviously negotiated prior to the seizure. That frustrated that form of transaction because you have to have underlying assets to do the transaction.

10.40 a.m.

We have also been hopeful that the ministry may proceed with power of sale on the Cadillac Fairview transactions. Crown Trust's involvement is about \$62 million in mortgages on that. We felt with those soft assets being there, there would be quite adequate collateral, so to speak, underlying security, to support \$20 million--a three-to-one ratio.

Does that respond to your question, sir?

Mr. Breithaupt: That deals with the initial management committee proposal, which was then not proceeded with for, among other reasons apparently, the reluctance of Canada Deposit Insurance Corp. to deal with that project on the length of time it might take.

What about other business solutions? I would presume you would have had ongoing discussions with the registrar and perhaps with the minister or with others on alternatives that might protect, at least substantially, the prospects of recovery by the preferred shareholders.

Were there those discussions and what suggestions were made, again, as we compare those possibilities with what is before us in this bill as the ultimate route the government is taking?

Mr. King: I guess our first course of communication with the department was on February 17, 1983. If I may read the letter, it says:

"I do want to thank you very much for the opportunity of meeting with you last Tuesday afternoon." That was with the registrar. "This is the first time that we have had an opportunity to discuss the matter of the Crown Trust preference shareholders since we first became involved last November." Actually, my note was October.

"As I mentioned to you, it is my preference to pursue a business solution to this matter. My suggestion of converting the Crown Trust preference shares to preferred shares of Central Trust with attributes to be fine-tuned to the new situation in my mind would be a response that would be acceptable to the shareholders.

"An inducement to Central Trust to consider this course would be for your ministry to enlarge the multiple base to say 25 times equity, a two per cent spread, which will provide enough income to Central Trust to service the dividends.

"When I mentioned this possibility, you seemed receptive, and I would be pleased to discuss this further with you. I, of course, would be pleased to meet with Central Trust in this regard if the conceptual view had merit in your position. I would like to emphasize again the importance of establishing a chain of communication so that the preference shareholders can be kept fully informed."

Mr. Breithaupt: What was the response to that letter? How would you summarize that particular proposal? "The expansion of the multiplier" is perhaps how you might refer to it. Is that the idea?

Mr. King: Just the sequence of events, Mr. Breithaupt. There was no written response from the registrar. I then took the initiative and wrote to Mr. Henry B. Rhude, who is the chairman and CEO of Central Trust, which letter says as follows:

"Further to our telephone conversation this morning and as you request, I am pleased to set out a proposal in conceptual terms of dealing with the Crown Trust preference shares through the facility of your company."

Then I outlined the present situation--\$19 million in essence outstanding, the number of shares and the annual dividend requirement and so forth of \$2.5 million.

"The proposal: In general terms, the proposal I would like you to consider is as follows:

"(a) On an exchange offer basis, Central Trust would issue a new series of its own preference shares to the present preference shareholders of Crown Trust. These new shares would generally have the same attributes as the Crown shares (that, is the par value \$20 share, total dividend of \$2.5 million assuming a full exchange took place).

"(b) The new Central trust shares so issued would be retractable after, say, a five-year period, after which retraction would be at the option of the holder," in other words, the agency.

"(c) The Crown Trust preference shares so acquired would be an investment asset of Central Trust. The underlying security for this investment would be the assets of Crown Trust available to its preference shareholders in the normal course. In newspaper reports you may have noticed that these assets have been referred to as including the 'soft assets' of Crown Trust.

"(d) Central Trust would manage the orderly liquidation of the Crown Trust 'soft assets' over, say, five years, either under its present management agreement or a specific agreement for this purpose.

"(e) As the 'soft assets' are realized, the cash would be used to redeem the Crown Trust preference shares held by Central Trust.

"(f) The appropriate government authority would undertake to grant a 25 times multiple on the borrowing base applicable to these new Central Trust shares issued in exchange for the Crown Trust shares. This would permit increased deposits of approximately \$447 million (25 times \$19.1 million).

"(g) Assuming an average two per cent spread, the new borrowing base would result in additional pretax earnings of Central Trust in the amount of \$9.5 million less costs of administration (\$447 million times two per cent). After 50 per cent tax there would be approximately \$4.7 million net earnings out of which the new preference share dividends of \$2.5 million would be paid. This would leave approximately \$2.2 million per annum as an addition to retained earnings in Central Trust."

There would be a time lag because you would have to get up to your multiple.

"The Canada Deposit Insurance Corp. in providing insurance to the deposit-taking function might have some concern, but this could be offset by a degree of investment control which would ensure the soundness of this aspect of the business.

"Apart from the potential advantages to Central Trust, together with an impressive list of new preference shareholders, we would expect the trust industry should be pleased with such an arrangement; the Ontario government is not obliged to provide any warranty or guarantee; and this proposal deals with the one remaining problem left in Crown Trust regarding the some 4,000 preference shareholders.

"I would like to let you know that we have discussed this proposal with Mr. Murray Thompson, registrar of loan and trust corporations for Ontario, Mr. John Finley, QC, of Smith, Lyons, Torrance, Stevenson and Mayer, and Mr. Peter Carroll, FCA, of MacGillivray and Co., who have been assisting our firm, together with several institutional shareholders. The foregoing have indicated a positive response to this proposal and, like myself, feel it could be the genesis of a solution in business terms to a unique problem.

"We stand ready to meet with you at your earliest convenience to pursue this matter further.

"Looking forward to hearing from you."

Mr. Breithaupt: What was the date of that letter?

Mr. King: March 1, 1983.

Mr. Breithaupt: This was after the original proposal of the 25-time multiplier which, even at two per cent, would generate sufficient funds to make a dividend payable to the preferred shareholders and earn substantial revenue for Central Trust?

Mr. King: Yes.

Mr. Breithaupt: And then what happened with respect to this proposal?

Mr. King: On the proposal to Central Trust?

Mr. Breithaupt: Yes.

Mr. King: First, I had a letter on March 7, 1983, from Mr. Rhude.

Mr. Breithaupt: Did you get a further response from the registrar?

Mr. King: No, there was nothing. Frankly, I felt that the registrar was so busy that I did not pursue it. I had written to him, and because I did not get a response or particular encouragement other than that he was open to ideas, I felt I had to pursue this course of action.

Mr. Breithaupt: This was something that ultimately would be resolved with Central Trust, with the blessing and perhaps relief of the registrar or the government of Ontario. They were not direct players in this proposed plan, but it would have to be resolved with Central Trust or be acceptable to Central Trust, in effect?

Mr. King: Frankly, what I felt deep down was that the preferred shareholders were forgotten. I cannot understand why an arrangement would have been gone into with Central Trust without an arrangement of this sort to look after the preferred shareholders. In other words, "We have preferred shareholders in Crown and, as part of the agency agreement and so on, let us work out a business solution where perhaps they become shareholders of your company."

Mr. Breithaupt: In the months that followed, do you still feel they were forgotten?

Mr. King: Absolutely. It is speculation, I appreciate, but it is hard to imagine that any consideration was given. In fact, in my discussion with Mr. Rhude, there was nothing forthcoming from him to suggest that there was any conversation with him in dealing with the preferred shareholders.

Mr. Breithaupt: Perhaps Mr. Thompson would like to respond to that. Were they forgotten?

10:50 a.m.

Mr. Thompson: I am sorry; they were not. We have had many telephone calls back and forth. In fact, we are here today hoping that we can get this bill through and preserve the estate, trust and agency business under the Central banner. We are facing cases in court where there are actions to remove Crown simply on the basis of its financial condition. Really, the purpose and urgency of this bill is to preserve this deal with Central and to get what we hope would be \$20 million to the account of Crown and ultimately, we hope, for the benefit of the preferred shareholders.

Mr. Breithaupt: Presumably, as these various actions continue, there is on the other side of the coin the fact that six or eight months having gone by, these so-called soft assets may be maturing or developing--hardening, we could say--which ultimately might be to the benefit of the preferred shareholders. Is that part of your consideration? If so, how do you see further recovery in this instance for preferred shareholders over this period of time when you are looking at the \$18.8 million of value at one time for their securities?

Mr. Thompson: There are two significant soft assets: the Daon loan--

Hon. Mr. Elgie: Which is \$50 million, isn't it? Plus Crown had a 50 per cent ownership--

Mr. Breithaupt: In that Vancouver building?

Mr. Thompson: I think we now have secured that to a great degree. The building now has been topped off; it will be finished in March. Leases for nearly a quarter of that building have already been entered into.

I want to emphasize the difficulties in that transaction, at a time when \$50 million was invested there, which I would say mildly was an unauthorized investment. We negotiated this whole transaction and we have obtained the required order in council to approve it. Now that building is going to go ahead. We are very hopeful that over a period of time, the \$50 million and a return on that will be recovered.

Mr. Breithaupt: How much of that would go to the preferred class? Or would those funds be used for other obligations?

Mr. Thompson: If you try to piece this off into bits, it is very difficult. A lot of these proposals really were related to the fact that you take--let us go back to what Crown ought to have been. It ought to have been a company that had roughly \$45 million in capital, of which roughly \$20 million represented the preferred shareholders.

The magnitude of these two transactions of \$130 million is such that you simply cannot take--obviously at this stage you have a substantial amount of depositors' money in those transactions. You cannot shift the soft assets to somebody else, unless you have

the Canada Deposit Insurance Corp. picking up that \$130 million right off the bat, forgetting all the other things that might be involved in there. That is the difficulty in approaching any solution to it.

Hon. Mr. Elgie: Do you have a list there of the soft assets? It might be interesting for the committee to understand just what are considered soft assets.

Mr. Thompson: I want to say the other part too. I want to make the point that the estate, agency and trust business is producing five per cent of the gross from that business--not of the profit, but of the gross revenue received on that business. You have to look at the whole structure of the transaction. I think that is a very favourable deal. When you look at it, when Central is supplying the staffing on it and when they have to pay that, whether they make a profit or not--and as we all know and has been stated here, this is not a great profit centre for a trust company. So I think that segment of the deal should be clarified.

Mr. Breithaupt: Finally, on this particular proposal, did you have an opinion on the increase of multiplier idea from 20 to 25, as was suggested, with the two per cent return on net benefits that might generate some funds? Was that a possibility? Or would the requirement of capital increases and the acquiescence of the CDIC to be on the hook for a project like that--would that have made it unlikely, in your opinion?

Mr. Thompson: The one thing that made it unlikely was the fact that the CDIC would have to, in effect, buy all the soft assets to make that deal.

Hon. Mr. Elgie: The decision about the multiplier was not ours.

Mr. Breithaupt: I realize that, but your opinion would no doubt have been sought on the project.

Mr. King, that gets us then down to--

Hon. Mr. Elgie: Were you interested in the soft assets?

Mr. Breithaupt: Yes, I would very much like to see that list or hear just an overview of it.

Mr. Thompson: There is the Cadillac Fairview transaction, which is \$63 million. There is the Daon Development loan of \$50 million, which is now called the Park Place Towers Ltd. loan. There was an advance to Greymac Credit of \$7.5 million.

Hon. Mr. Elgie: It was for a prospective acquisition, proceeding a resolution by the shareholders and directors.

Mr. Thompson: There was an offer by Crown to purchase buildings located at 20 and 36 Toronto Street and 43 Victoria Street with a letter of credit of \$25.5 million. There was a loan receivable from Kincorp in the amount of \$3.75 million. There was

an investment in Carlyle Eagle Resources in the amount of \$2 million, plus a commitment to invest a further \$3 million.

Hon. Mr. Elgie: If I recall, registrar, there was already an outstanding loan to Carlyle Eagle from Greymac Trust, and payments had never been made on it at the time this was issued.

Mr. Breithaupt: Just an aside, who or what is Carlyle Eagle?

Mr. Thompson: It is a resource-based company in petroleum exploration in Alberta. It has been the subject of a number of amalgamations since that time.

Mr. Elston: So it is competition to Trillium Exploration, I presume.

Mr. Thompson: Not any more.

Mr. Breithaupt: And then there were some other smaller items, were there?

Mr. Thompson: Yes. There is a receivable from Mr. Howard Eaton in the amount of \$195,570.48. There is an amount receivable from Greymac Trust for \$337,523.57 with respect to bonuses paid to employees of Greymac Trust.

There is an amount due from Greymac Trust of approximately \$651,000 which relates to the crown overcontributing with respect to the Cadillac Fairview mortgages. There is an investment in Bancorp Mortgage Investment Corp. in the amount of \$640,000, plus a further commitment to invest \$360,000.

There is a 1983 Mercedes Benz 380SEL purchased for the amount of \$58,880--

11 a.m.

Mr. Elston: Is the ministry interested in that?

Hon. Mr. Elgie: It had already been purchased by Central Trust for the book value.

Mr. Thompson: The car was recovered and purchased by Central.

There is an equity investment by Crown Trust in approximately 25 million of Camreco Investors Ltd. and an \$11-million mortgage to Narod Developments Ltd., under which \$5.5 million had been advanced--that was a joint loan with the Canadian Co-operative Credit Society--for a property that is known as Mariner's Point in Vancouver, which is currently in receivership.

Mr. Breithaupt: What does that list total?

Mr. Thompson: I am sorry. I do not have a total on that. I can have one made up.

Hon. Mr. Elgie: Are there any other comments to add to that, Mr. Deputy?

Mr. Breithaupt: Just on this theme, maybe we can sort of tie together this proposal.

Mr. Crosbie: I have a question. I just want to make sure that I understand Mr. King's proposal. In his opening remarks, I understood he attributed to the federal government a desire to prop up a company that was in liquidity difficulty. I assumed he was referring to Central.

Now this proposal, as I understand it, would ask us in effect to create an additional asset base in Central of \$18 million, almost out of thin air, and then increase their multiple by 20 to 25. I just do not understand the consistency, or the lack of consistency, between those two statements.

Mr. Finley: It is less than the shortage that was there when you put the assets in.

Mr. Crosbie: How can you say on the one hand this was a company that was not deserving of this transaction because it was having liquidity problems and then turn around and say the same company should have its asset base and its multiple substantially increased?

Mr. Breithaupt: It is certain that, after the fact, what alternative would they have had, just in trying to make it go?

Mr. Finley: There is a certain equity involved in that, Mr. Crosbie, as evidenced in the first three months of Central Trust's operations under this management agreement where it is getting a substantial cash flow. Its liquidity problem has substantially improved, and it is showing a substantial earnings base in the first three months over the past.

We are inclined to believe that perhaps it is our assets that are doing it. It would have been nice to have been in there, sharing them.

Mr. Crosbie: I am not aware of how that asset basis got in there, because it is the assets of the company which--

Mr. Finley: They are getting the income flow, whether they own the assets or not. They are getting the difference between the net income on the estate, trust and agency business, for example, which Mr. Thompson spoke about. The income on that business is in the order of \$3 million to \$4 million a year, and they are only paying Crown Trust shareholders ultimately \$550,000. Therefore, there is in excess of \$1.5 million to \$2 million going into the company every year. That happens to be an asset of the shareholders of Crown Trust that you gave to them. That is how their assets are increasing. They are increasing with the benefit of the preferred shareholders of Crown Trust.

We think it would have been very equitable for the preferred shareholders to have shared in that. That is how we can justify it.

Mr. Crosbie: I think that is an entirely different argument from the question I asked. I do not see how you can condemn the company on the one hand as being a bad risk for the investment or for taking over and the other time suggest you increase its ability to operate in the marketplace.

Mr. King: Mr. Crosbie, there are assets and there are assets. A billion dollars in agency business, which is not listed as the company's own assets or on the financial statements, is an off-balance-sheet asset of \$1 billion. There had to be an accommodation from the registrar, federally and provincially, and the co-operation of the companies. There had to be some good will recognized here.

What I am suggesting is that the off-sheet assets, i.e. this major asset, which took some 85 years to build up, is a valuable tool. I recognize that with the multiple purposes for calculation, it would not have been included, but in my judgement it was a significant asset which would have justified an accommodation which probably would have resolved itself in five years' time.

That is the justification I had from that. There were other assets. Goodwill is not reflected, for example, and while it had deteriorated substantially as a result of the seizure, perhaps with recognized quality people on respective boards and things like that there could have been an attempt to salvage it.

Mr. Crosbie: My final observation would be that they seem to be values that you see now after the fact which were not apparent to the people in the marketplace when these assets were offered for sale.

Mr. King: Mr. Crosbie, Crown Trust had to be one of the finest, noble institutions this country had.

Mr. Crosbie: I am not denying the history of the corporation. I am just observing that when it was offered openly on the market, the values which you now see apparently did not commend themselves to the purchasers. I do not know what other way you would go about negotiating such a sale except by the open process we did.

It seems to me what you are suggesting is that we could have gone--forget Central--your deal would have applied to any trust company in Ontario if we had gone to them and said, "We will let you increase your asset base by \$18 million and we will increase your multiple, provided you turn part of the proceeds over to the Crown Trust preferred shareholders." I just find some difficulty with applying that concept.

Mr. King: Yes. I think looking at it in a defined way. I was looking at it in the sense of integrating, an amalgamation in assets of this with the support and accommodation of these various regulatory bodies. That is simply what I was doing. I think it had merit. One of the people I spoke to was the chairman of Royal Trust and there was certainly an interest there. They considered it and came back to me. They were not afraid of regulatory bodies or that type of thing, but I felt that if I could get the goodwill

and co-operation of all these departments we would have had a successful business solution. I am convinced of it.

Mr. Breithaupt: Mr. King, you had two suggestions, then. The management committee proposal that first came to mind and then, secondly, this relationship with Central Trust, once that had been decided, to be the successful bidder with the hope that there would still be the opportunity of some protection as a result of your proposals made to Mr. Rhude.

What was the response to that, or did that "second business solution," as we might call it, come to an end at that point?

Mr. King: No, Mr. Breithaupt. I received a communication to my letter on March 7, which is as follows:

"Thank you for your letter of March 1.

"In order to issue further preference shares, Central must secure the consent of the superintendent of insurance." That refers to the federal regulatory body. "In order to satisfy the superintendent and to satisfy the directors of Central, Central must receive money or moneys worth in respect to any issue of preference shares approximately equal to the par value of these shares.

"Clearly, Central would not be receiving anything approaching the value of the preference shares of Central to be issued. On this basis, I cannot recommend nor could expect the superintendent or the directors to approve a transaction of...

"Even if we assume that the transaction proposed by you was approved by all parties concerned, it would, in my opinion, be a poor financial transaction for Central. You have set out in your letter certain calculations for the purpose of illustrating the benefit to Central. One of the major benefits of any issue of shares by a company is that the cash received or the property acquired will itself produce revenue for the security issued. If Central issued \$19.1 million of preference shares for cash, we would expect to invest this money at an interest rate of approximately 10 per cent. This would provide an annual revenue before tax of \$1.9 million. This is not included in your analysis."

Of course, what he is missing there is the increase in the deposit-taking capacity he has to make a profit on the loan side.

"Central is not in any preferred position in relation to the proposed transaction. The proposal can be placed before any trust company or other company.

"Thank you for letting me have the opportunity of reviewing your proposal."

11:10 a.m.

Mr. Breithaupt: You mentioned that letter missed the opportunity to earn money from increased loans, based on the ordinary lending base, I presume. It would also then have missed

the opportunity to consider what additional profits might have been made from an expanded multiplier.

Mr. King: Right. Actually, he did phone me the following day or several days later and we discussed his liquidity problems. It was at that time he told me that they were doing a preferred share issue, which came out in May, I believe, of a sizeable amount to get his own liquidity problem solved.

Mr. Breithaupt: As a public issue?

Mr. King: A public issue, yes. That was successful. I still think that would be a very good avenue to go, particularly in the light of Bill 97. Certainly with the transfer of the ETA business and with the accommodation of the regulatory bodies, I think it should still be pursued. You must appreciate that as chairman, and in this industry, liquidity problems are always uppermost in management's view, because that is what gives them the capacity to do business.

Mr. Breithaupt: Yet presumably the result of Bill 97 would mean that Central Trust need not bother proceeding with any accommodation.

Mr. King: Oh, no, they are preferred shareholders again, and nowhere do I see any mention of the preferred shareholders or concern for them. It keeps coming up, I am afraid. I can appreciate the concern that the registrar has; it is roughly, say, \$1 billion in assets under administration. What is going to be there in five years' time is the risk that one is taking. I think the staff you have--I know the registrar mentioned putting in staff and so on, but I must remind you that they had an extremely competent staff, despite all the problems. It is really quite fantastic how they have been able to retain the business they have.

Mr. Breithaupt: So that ordinary management, with efficient, continuing staff, should not see a collapse of the prospects of maintaining that business or, at least, certainly a substantial share of it.

Mr. King: Yes, I think you would appreciate that if you have a corporate co-executor, the relationship is with him as a person. That has been my experience in the industry; that while the corporate entity has some value or meaning, the relationship is with the person you are dealing with; it is a very personal business.

Mr. Breithaupt: Were there other business solutions that have arisen beyond the two that you described to us as alternatives this morning?

Mr. King: There were a number of other ones on the same basis but in the light of co-operation from the CDIC, because I recognize that was one of the major problems the registrar would have, I was just hoping that his negotiating ability would create some sympathy for the problem in a very unique situation.

Mr. Breithaupt: So even if those suggestions that you

had proposed with respect to benefiting preferred shareholders might have been of interest to another trust company, the same general problem of either multiplier increase, CDIC acknowledgement or the approval of the federal superintendent of insurance would have come into play in any case.

Mr. King: Right. I did write to the CDIC. I received a letter from Mr. De Coster on March 30. I simply outlined the proposal in my letter.

Mr. Finley: To give you the background on this, we met with a number of trust companies to see if we could work out a similar proposal. One of those trust companies was Income Trust in Hamilton.

Mr. Breithaupt: I should say at this point, Mr. Chairman, I happen to be a director of Income Trust, but in any event I have no personal knowledge of those negotiations.

Mr. Finley: The result of that was a proposal that was developed. A copy of the proposal was provided to the Canadian Deposit Insurance Corp. This is the CDIC's response to Mr. King, where he comments on the proposal that was made to Income Trust.

Mr. King: It is dated March 30.

"I acknowledge receipt of your letter dated March 21.

"Without reacting in any way to the proposal set out in your letter to Mr. Walman of the Income Trust Co., I wish to bring to your attention that the indebtedness of Crown Trust to Canada Deposit Insurance Corp. is secured by a fixed and floating charge on all the assets of Crown Trust including the so-called 'soft assets' and that you would be best advised not to take for granted that CDIC will ever consent to abandon that security."

My response to Mr. De Coster--Robert De Coster, chairman of the board, CDIC, was:

"Thank you for your prompt response to my letter of March 21, 1983.

"I do want to assure you that we had not taken for granted that the CDIC will consent to abandon its security despite the fact that, to date, the preferred shareholders have never been recognized in the actions taken by the several regulatory bodies.

"What I have taken for granted, however, is that you would accommodate any reasonable business solution to resolve this matter and, at the same time, attempt to restore the confidence in the investing public's mind regarding the trust industry in which the CDIC is a major participant.

"I would welcome an opportunity of meeting with you to discuss this matter further."

There was no response.

Mr. Breithaupt: That would have been, presumably, the general response to whomever you might have approached.

Mr. King: Yes. At that stage, Mr. Breithaupt, I felt truly frustrated and I do not give up easily. Subsequent to that we felt we needed direction from the preferred shareholders. Even though we are prevented from having a shareholders' meeting, as you know, we had a meeting of preferred shareholders in late June, at Commerce Court Hall, to receive their instructions.

I felt the legal pursuit of this was extremely difficult. We did not know who did what to whom, although we certainly had an idea of the problems. I recognized it as being costly and in my concern for this industry--which I have been closely connected to for many years--I felt it would be damaging. If we could resolve a business solution, we could push on and any damage would be long forgotten.

Mr. Breithaupt: Just to complete this theme, having dealt with the management committee and this series of considerations in this correspondence, did you see any other business proposals or solutions that would have benefited the preferred shareholders and protected, to a degree at least, their substantial assets?

Mr. King: The thought I had in mind--and I did not pursue it, because it really would require the government's co-operation--but as you have been told today, and as I have been told, if you hang on long enough and everything works out in some years to come, some money may come to these people.

Because of their age and dependency on income, my impression of the hundreds of people I have spoken to is that it is not so much the return of capital; their basic concern is the loss of income. They were living on it. I think they could live with the fact that there may be a payout in years to come of some description, but these people went to the broker and they asked for a steady thing. They knew they could get the dividend tax credit and a 14.5 per cent preferred share is certainly an attractive vehicle in what they perceived as a secure situation.

11:20 a.m.

I have given thought to that. I have not pursued it because we had become involved in trying to pursue a motion as to the constitutionality of this legislation. I do not want to get into that, unless you so wish.

The thing that I think could be possible is, looking at the Province of Ontario Savings Office--I believe there are 13 in there which create about \$84 million to the general revenues of the province--if the government felt comfortable that the par value would be covered in time, the provincial savings office could exchange these preferred shares to that, which would cost \$2 million a year. Look at the legal expense with the things that have gone on here. Relatively speaking, we are talking of a modest amount, \$2 million. Let the Ontario government have these preferred shares as the payout. It is an incentive to recover the

investment. I realize there is a difficulty on that. I tried to find the provincial savings bank legislation--I believe it is under the agricultural act, isn't it?

Mr. Breithaupt: It has been going on for a long time.

Mr. King: It turns out it is not a crown corporation, so it is with the legislation to create a corporate entity to issue the preferred shares. I appreciate it would be gratuitous on behalf of the government, but in the light of what has happened--it is far-reaching--I think it is something that perhaps could be considered. The security, as the registrar has pointed out, may well be there in years to come.

Mr. Breithaupt: I would be the last one to talk against the opportunity to earn legal fees, but it would seem to me that moneys might well be otherwise employed to benefit these preferred shareholders under that kind of proposal. Have you taken that proposal any further as far as those in authority are concerned?

Mr. King: No, I have not, Mr. Breithaupt. I have discussed it with counsel. They have presented the legal problems to me of what the government would have to do to do it. I have not taken it any further than in-house. I have briefly discussed it with the Crown Trust preference shareholders' committee, and that is as far as it has gone.

Mr. Breithaupt: That, then, effectively deals with the alternatives you had seen in the presentation you have given us.

Mr. King: Yes.

Mr. Breithaupt: Let us then move on just a moment to the operating agency agreement with Central that came out after February 7 and which of course would materially affect the preferred shareholders.

Mr. Renwick: Perhaps before you go on with that area we could deal with the question of the responsibility of the government to the preferred shareholders.

Mr. Breithaupt: Yes, if you wish. Certainly, I would be pleased. Please go ahead and I will deal with that in a moment.

Mr. Renwick: I will not take very long, because you have covered a great deal of the ground. I would like the minister to know, before I ask the questions, where I am coming from.

If one reads, with any sense of a layman's understanding let alone a professional's understanding, the offering circulars of both the series A preference shares and the series B preference shares of Crown Trust, the one dated 1977, the other one dated 1982, in the light of the position of Crown Trust in the constellation of trust companies in Ontario and its reputation, together with the Loan and Trust Corporations Act, one cannot make any valid distinction in the responsibility of the government of Ontario between depositors and preferred shareholders.

The preferred shareholders would invest only in companies such as Crown Trust, relying on a great many factors.

I want you to know where I come from. I know you make, as lawyers will, legal distinctions. I just want to tell you, as a practical business investment street matter, a person investing in Series A preference shares of Crown Trust or Series B preference shares of Crown Trust would be expecting to get the highest possible degree of security in his investment.

On that basis, why is it not possible, as Mr. King and others and my colleague have said, to work out a method by which Central Trust, the beneficiary of this transaction--let me put it in very simple terms--may create identical series of those shares and exchange them for the shares that are held by the preferred shareholders of Crown Trust and let Central Trust have the advantage of these soft assets? That is my first question.

Hon. Mr. Elgie: Whether we are lawyers or not and how learned in the law we may be, I think a general legal interpretation would see my submission. Again, we both know opinions are as valuable as to whether or not you pay for them and who gives them, but it is my view that the courts would substantiate the view that the Crown Trust preferred shareholders were investors. Certainly, the statutory base of Canada Deposit Insurance Corp. draws a distinct difference between depositors and investors.

As to whether or not any other arrangements could be made, I think Mr. Thompson has gone into that in some detail. If you want him to go into it more, I will be pleased to ask him to do so.

Mr. Renwick: No, I want the minister to answer.

Hon. Mr. Elgie: I have answered.

Mr. Renwick: No, you have not answered. With the greatest of respect, you have not answered. You have simply taken the line that CDIC is responsible to the depositors; you are not responsible to anybody. You have put in a lot of time and effort, but you have not put in any dollars into this operation; you do not have any dollar responsibility.

If you were dealing with Central Trust, from the point of view of the comments made in your letters of February 18 to Mr. Wilfred, you say: "Faced with the difficulties in Crown Trust, the government took the course of action it did to maximize the return on the assets of the company in the interest of protecting depositors and providing as much recovery as possible for preferred shareholders and others."

In the letter you wrote to me, you say: "As the situation stands, the preference shareholders retain a right to the residual value of the assets in Crown Trust. Any proposal to enhance this residual value will obviously be of interest to everyone concerned. Why do you not get Central Trust to take over, in whatever the legal procedures are, the position of the preferred shareholders in Crown Trust rather than leaving them out to dry?"

Hon. Mr. Elgie: With the greatest respect, they are not being left out to dry. The registrar is represented on the soft assets committee. I think the fact that the Daon situation has been salvaged, in our view, is an indication of the kind of efforts that are being made to preserve assets for the benefit of creditors and preferred shareholders.

I think Mr. Thompson has dealt at some length with the situation with respect to Central. These are investors; there would be no consideration for the issuance of such shares. But we have always been willing to listen to Mr. King's views and consider them. As he knows, those discussions involve more than this government.

Mr. Renwick: You obviously have not answered my question as to why Central Trust--

Hon. Mr. Elgie: In my opinion, I have answered it and no matter how aggressive you get--

Mr. Renwick: It is not a question of being aggressive. I asked you a very simple question. Have you discussed with Central Trust or will you discuss with Central Trust the position of substituting their position for the position of the preferred shareholders of Crown Trust?

Hon. Mr. Elgie: Mr. King and his solicitor read to you a letter from CDIC indicating their views on that. We had discussions about this whole issue and Mr. Thompson has indicated clearly that it was not deemed to be feasible.

Mr. Renwick: What is your position then? Are you prepared to stand in the position of the preferred shareholders of Crown Trust since you have obviously put up no money? You have left it up to the Canada Deposit Insurance Corp.

11:30 a.m.

Hon. Mr. Elgie: We are standing in the position on the soft assets representing the interests of many people, including the interests of the preferred shareholders, and that is our obligation.

Mr. Renwick: All right. As usual, you accept no financial responsibility for what happened to Crown Trust. What you refer to as my aggressive behaviour is related to your failure to accept that--

Hon. Mr. Elgie: We accept obligations imposed upon us by the Loan and Trust Corporations Act.

Mr. Renwick: You did not hear me. My aggressive behaviour relates to your inability to understand that you had a financial responsibility which you will not discharge.

Hon. Mr. Elgie: I do not accept that.

Mr. Renwick: You have not accepted that?

Hon. Mr. Elgie: No. I do not accept your statement that we have that obligation.

Mr. Renwick: That you have any obligation to the preferred shareholders.

Hon. Mr. Elgie: I have outlined the obligation, and we are fulfilling it.

Mr. Renwick: To the extent that there is a realization on the soft assets of Crown Trust or any kind of cash flow generated in there, what do you mean when you talk about the residual value? Who has claims against those funds?

Hon. Mr. Elgie: It is my understanding, and I stand to be corrected, that CDIC has first claim.

Mr. Renwick: So there is no residual value?

Hon. Mr. Elgie: No, I do not accept that at all.

Mr. Renwick: What is the amount of the residual value?

Hon. Mr. Elgie: As I have outlined pretty clearly, we will know the answer to that as time goes by and as the value of the assets is firmed up.

Mr. Renwick: In other words, you are saying that to add up the value of those residual assets is not a meaningful exercise at the present time.

Hon. Mr. Elgie: We have indicated that we now have reason to believe the Park Place situation has stabilized. Again, one has to wait to see what the final situation will be, but that is our present view. As outlined in the contract that was tabled in the House, we believe that something in the neighbourhood of \$20 million will flow, and there is an undetermined amount that may be received with respect to the \$63 million in mortgages on Cadillac Fairview properties.

Mr. Renwick: What is CDIC's claim?

Hon. Mr. Elgie: The last I heard it was up to approximately \$80 million. Have you heard the latest figures on that?

Mr. Renwick: Do you expect it to go higher?

Mr. Thompson: No, I do not expect it to.

Mr. Renwick: Can you get information on what CDIC's ultimate claim is going to be or an explanatory statement as to the nature of the claim for this committee?

Mr. Thompson: Yes.

Hon. Mr. Elgie: If it can be obtained, we will be pleased to make inquiries about it.

Mr. Renwick: On your estimate, given what you understand to be the prior claim of CDIC, what do you consider the residual value available for the preferred shareholders?

Hon. Mr. Elgie: I think I have outlined the potential value of the assets to as great an extent as possible at this time.

Mr. Renwick: And you are not prepared to stand behind them?

Hon. Mr. Elgie: We are standing behind their interests with respect to the soft assets on a regular basis.

Mr. Elston: I just have two or three questions.

One relates to the soft assets. I presume that what you listed was the book value when you took over the corporation. At that time, you thought they were worth less than the expected book value.

Can you comment on the relative position to the time you took over? Are they half as good now as they were before or are they a lot better? How can you expect the preferred shareholders to wait and wait and wait without knowing or having an up-to-date report on how these so-called soft assets are developing because that really does reflect on the type of exercise you are asking them to take?

Hon. Mr. Elgie: Mr. Thomson, can you comment on the process that has been going on to date with respect to the soft assets committee and any material information that might be available?

Mr. Thompson: Yes, sir, and I am sorry that Mr. Breithaupt is not here. The total was \$225 million.

Mr. Elston: Total dollars?

Mr. Thompson: The soft assets. I think the term "soft asset" means something in the sense--

Mr. Boudria: Could I just ask you to elaborate on that? Is this the total of the same assets listed on schedule C?

Mr. Thompson: There have been additions. Yes.

Hon. Mr. Elgie: To prevent a deal.

Mr. Thompson: There have been additions to that.

Hon. Mr. Elgie: The final listing of it will be available in the Peat Marwick review of Crown Trust. It should be available first.

Mr. Boudria: That is \$225 million?

Mr. Thompson: Yes, \$225 million, if we may just qualify the figure on it.

Let me say that we have not given up on recovery on any of the assets I outlined to you. We will pursue and continue to pursue as expeditiously and strongly as we can the claims for the recovery of those moneys. The committee that is handling this is meeting continually on it and developing ways to try to make the utmost recovery on it. I can only say that in broad terms because each one is a myriad of problems. To say what is the value for each, I do not know. To put a value on it today, I do not know anybody who knows how to put a value on it. This is our damnable dilemma, if I can use that phrase, because we simply do not know how to say that this is worth X dollars.

Mr. Boudria: Are there not some assets out of that release that you can put some value on? Granted, there may be some of them which you have difficulty with, but are there not at least some on which you are in a position to say, "This particular item is no longer worth \$600 million, it is worth \$502 million"--or \$502,000 is the figure I am looking at at the present time. Or can you something else is not worth \$62 million or it is definitely now worth \$60 million. Is there nothing on that list you can firm up except for the Daon one you indicated a minute ago?

Mr. Thompson: No. The Daon one--we have every hope and expectation to get that money back. The only thing we have really secured is the automobile. That is all we have and we will get as much as we can out of it.

Hon. Mr. Elgie: There are numerous lawsuits under way with respect to several of those items.

Mr. Elston: Could I ask a question about the committee? I presume as far as these soft assets and preferred shareholders are concerned, that is really where in your opinion their ultimate salvation lies.

Mr. Renwick: Their only salvation.

Mr. Elston: According to the statement we have now, it is their only salvation.

Can you tell me a little bit about the committee, to describe it so the shareholders have an idea who is on this and who is doing what? I understand you are represented, although you are not personally involved?

Mr. Thompson: I go whenever I can to these meetings on it. I am represented there by David Richardson of Woods Gordon. I believe the Canada Deposit Insurance Corp. has added four people to its staff under the general manager, J. P. Sabourin. The people directly involved are Dennis Jewitt, who is a former Clarkson person. Roy Voelker, who was originally my appointee on Seaway Trust and is a chartered accountant, is now working for them.

David Taylor is now working for them. David Taylor is a lawyer and was formerly my appointee on Greymac Trust. So they have added these people to their own staff. I think perhaps Sabourin and Jewitt are the ones most directly involved in this, but the others are available to them.

Mr. Elston: In terms of the soft assets then, you are really, as an administrator, looking at a business decision or a business process to recover these assets?

11:40 a.m.

Mr. Thompson: That is correct.

Mr. Elston: In many ways, the recovery process is a gamble for which you really have no financial liability. It really falls back on preferred shareholders if your business dealings do not work out.

Mr. Thompson: I think I do have a liability. I think the Crown Trust Act sets a standard.

Hon. Mr. Elgie: It imposes a liability on it.

Mr. Elston: A reasonable liability?

Mr. Thompson: Yes. I think that was well settled by Bill 215, subsection 10(3).

Hon. Mr. Elgie: Just summarize the last part of the brief.

Mr. Thompson: Yes. There is an exception there to the usual crown immunity. It says: "Except an action against the registrar, otherwise available in law for the recovery of damages incurred as a result of any failure of the registrar to act honestly and in good faith, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in discharging the duties and responsibilities of the registrar in comparable circumstances, having regard to the public interest."

Mr. Elston: I guess if we consider for a moment the public perception of the government's business ability, that is a pretty loose standing.

What we are doing is asking a government-organized or government-sponsored committee, in a business fashion, to salvage some assets when they refused a couple of business proposals from private industry, if you would, to salvage the position of these preferred shareholders.

The thing I have a hard time understanding is how you expect them to have a great deal of trust for them--a trust received from them for that process--when you are unable to provide them with the very basis of information they need in terms of figures and numbers. The bill we are dealing with does not really get us any closer to that for those people.

They have come up with some proposals and they have been refused. How do we guarantee, as closely as we can, that there will be something left over for these people when they had proposals which would have given them some return before? I understand there were no replies to the letters they have written.

Mr. Thompson: Let me say, "Go back to the committee stage and say all right." However, Woods Gordon and their entire resources as management consultants are available to the committee in the determination of it. Therefore, it is not really two government people sitting down and discussing this.

However, I would say on any business proposal with respect to the soft assets or business proposal with respect to the preferred shareholders, I look at our role now as trying to maximize the recovery of these soft assets. If we can get this stabilized to some degree, where we can come up with at least even a ball-park figure of an estimate of recovery, then at that stage perhaps we have the basis to sit down and talk to somebody. However, right now there is the uncertainty about a lot of these things--and much of it is in litigation. These things just have to be resolved before we are in that situation.

With respect to giving any form of report on it, Peat Marwick Mitchell and Co. are the shareholders' auditors. They were removed. I restored them to the company in the hope that by restoring them they would be the shareholders' auditors. They had already completed half of their audit and I had hoped they would have a report out long ago. However, despite the insurmountable difficulties--and I suggest it is really relating to this very problem they are having--while I am sympathetic to their difficulties, because I share them to some degree, I am most anxious that some form of reporting gets out. This is very fundamental, because this will be the base report which will serve as the basis for all future years as to measure and, indeed, to measure my performance.

Mr. Elston: What is the position ultimately? The question I really want to come to now is that we have retained, I suppose--we, the province, in this sense--a good number of professional people. How are you keeping a handle on those sorts of expenses?

We have people from Woods Gordon involved, and we have Peat Marwick involved in making up these reports. We have any number of people appointed to the committee. That again will eat into the number of dollars which will be available for the final distribution and that again is going to affect these people.

It seems to me that what we have got is a very complex sort of procedure set in place to deal with implementing a business decision that at least partially could have been salvaged by a program that was earlier outlined--one or two of the programs partially outlined earlier; I am not sure, we did not get all the details of it--to which the minister did not respond in one fashion or another.

I keep wondering how much money are we spending and how are

we controlling that expenditure when the people who are going to bear the cost of all this are sitting with a representative here in the committee today in the person of Mr. King. Can you comment a little bit about that part of the financial package?

Mr. Thompson: I can to this extent: This is a rehabilitation process and part of those costs will be attributable to the rest of the industry.

Mr. Elston: What part?

Mr. Thompson: A lot of the costs on the rehabilitation. I can give you an example of it.

The cost necessary to, say, foreclose on a mortgage that went bad in the ordinary course of business is properly a cost to the company, because it is a business operation. But the costs of us going into possession and taking control of the assets and those associated costs will be borne and shared by the industry.

They are the sort of broad two parameters in working it down. I am sure that will be before this committee with respect to the detailed breakdown on it. But the general rule is that costs that will be borne by any of the companies concerned here will be only those that in the ordinary course of their own business would be charged to the companies.

Mr. Elston: Do you have an idea of what those figures are now? Did you keep a running total of those or numbers for professional assistance?

Mr. Thompson: No. We have the breakdown on them.

Mr. Elston: So those sort of go on for a while until you implement the final solution, so to speak?

Mr. Thompson: Yes, they will.

Mr. Elston: Do you have a capability of getting it for us relatively quickly? Or is that impossible?

Mr. Thompson: No, I can--

Hon. Mr. Elgie: There will be an estimates total on this, and they can be available--understanding that there will be numerous discussions about responsibility for costs; for instance, the Morrison report, which will be shared with the federal government. As the registrar has said, those costs relating to the possession and control of the assets and the rehabilitation of the businesses are assets that are chargeable all or partly to the industry. Those will be matters that will be determined.

There are numerous costs that will be settled only when certain court actions are settled. For instance, in the Cayman Islands we were awarded costs of \$100,000 in a small action. Much of what the costs are will relate to a number of issues.

11:50 a.m.

Mr. Elston: The end result is that you may have received \$100,000 ~~but it~~ would cost you \$250,000 to do the work. It is still going to be a net difficulty for these people.

I think what we are ultimately coming towards is the question of the responsibility imposed by Bill 215, which the registrar outlined, that if these people ultimately feel you were not reasonable, their own access to determine that responsibility or reasonableness is going to be again going through the courts. You are not going to say you entered an unreasonable deal, presumably, as a final solution.

We have already heard this morning that there is some concern about the transaction surrounding the estates, trusts and agencies portion of the agreement in front of us. Maybe I could ask Mr. King to comment further on the amount of moneys to be paid on that. You have an estimate of income or cash flow, of gross income for these?

Mr. King: Yes. The problem, of course, is that we have antiquated information. The last audited statement was almost two years ago. But the ETA business generated an income of \$11 million at that time; at five per cent, that is \$550,000 or \$11 million a year.

Mr. Elston: And at this point I take it your position is that if the business kept its current return, the \$550,000 is a paltry sum or an unreasonable bargain to have been struck in the situation.

Mr. King: I think it is a real bargain when one thinks of the cost of investment to create that kind of business; it is a steal. The concern I have with the bill, apart from what was the agency agreement that was established--that is history now, I suppose--is what happens in 1988. You have \$550,000 coming into Crown Trust in income; in 1988, if by chance you have a billion dollars still--or it might even increase, but whatever--then that is a freebie, because it is being transferred.

Mr. Elston: But at your expense.

Mr. King: Absolutely. It is an asset. To me that would be imprudent, frankly, not to consider. I think the registrar has a problem in that he does not know what the ETA business may be in 1988, but there could be a deal constructed whereby on a formula basis whatever ETA business is in place at the end of that time--there are benchmarks, and an insurance agency sells from one to two times gross premium income; that is a capital value.

It represents goodwill and the cost to you if you were starting a business; how long would it take to develop that extent of business? The same thing applies here. It has a residual value, which in my view is not addressed in Bill 97, and I would commend to Mr. Thompson, if that has crossed his mind, to look at that. If there is nothing left at the end of 1988, so be it. I am just concerned what might be at the end there and whether the preferred shareholders will have lost something.

Mr. Elston: So really what you are saying is that had the Crown Life offer been accepted there would be an ability to provide a value for the cost of acquisition of this business--

Mr. King: Oh, yes.

Mr. Elston: --whereas with the Central situation there is obviously not a value being attributed to it?

Mr. King: Yes. In the Extendicare, they were simply buying common shares--I recognize the problem that existed--the proceeds of which could be placed in trust, pending reconciliation, lawsuits or whatever. But the Crown preferred shareholders would have gone on in a very substantial way. With the behind-the-scenes negotiations with CDIC and so on, they had the financial wherewithal to work out the problems that are alleged to have existed, or have existed.

I think that would have been a splendid deal for the preferred shareholders and, failing that, with Central Trust. I am just appalled that somehow they were not negotiated in this agency agreement to some extent. I am not aware of any discussions that took place with Central Trust regarding the preferred shareholders. Mr. Rhude certainly gave me the impression that they were not even mentioned.

Mr. Elston: The Central Trust position has been partly defended because they would have to put in their own staff rather than, as it appeared to me initially, using the Crown people who were already in place.

Do you know how many Central people had gone on to take over this operation? Or does the registrar? There has to be a consideration, and if they have put in only one or two managers, that is an awful lot of free cash flow for one or two people.

Mr. King: I do not know the numbers. All I can say is that Crown Trust had a very competent ETA staff in place at the time of the seizure, and other than maybe a vice-president in charge of ETA operations or something, I cannot believe there was any great demand on Central Trust for staff.

Mr. Elston: Does the registrar know about numbers? I mean, your point earlier was that one of the reasons the ETA was put in those hands was that there was an awful lot--it seemed to me, anyway, that you were referring to a large expenditure of funds to generate a staff to accommodate the acquisition of this business, but maybe I misunderstood you.

Mr. Thompson: The Crown Trust staff became Central staff.

Mr. Elston: Okay.

Mr. Thompson: Central picked up the cost of that staff.

Mr. Elston: But they did not have to retrain or generate new people themselves; they just took over the operation.

Mr. Thompson: That is correct.

Mr. Elston: Those people already had the training and the ability to administer the program, and all they did was take it over, and they took the payroll.

Hon. Mr. Elgie: I do not want to interfere with your line of thought, because I think it is an important one. However, I remind you, to go back to the Crown Trust Company Act, and the fact that Extendicare, in its offer to acquire the assets--not shares--of Crown Trust, offered \$2.5 million. That is our estimate of what it would have worked out to. That was their estimation of the value of all the services being provided by Crown Trust in terms of what it was worth to them.

The Central Trust offer, we hope, on the basis of figures generated, will yield something in the neighbourhood of \$20 million. I think you will agree that this is a significant difference and it certainly was important.

Secondly, I remind you that you cannot look at the estate, trust and agency accounts in isolation. It was the total package of all the business of Crown Trust that was being looked at, and it was deemed to be a valuable asset as an ongoing business. So you cannot just isolate out one section of it.

Without the estate, trust and agency business, frankly, I do not know whether it would have been worth very much at all--other than some other arrangements that are made and simply managed for five years, just on a retainer basis at very low cost. Is that accurate?

Interjection: Yes.

Mr. Breithaupt: With the Extendicare offer, did that not also acknowledge the continuing value of obligation to the preferred class of shareholders? One might say, in effect, that these were about equal total obligations that were going to be reached. So that although in the second case the preferred shareholders are not particularly protected, they may have a prospect of some benefit.

Hon. Mr. Elgie: I outlined the terms with respect to an acquisition of the shares which we and the CIDC laid down. I think they are self-explanatory. Are there any other comments on that issue?

12 noon

Mr. Gillies: While we are pursuing this line of questioning, can you attach a dollar value to the Crown Life Insurance Co. proposal?

Hon. Mr. Elgie: Which one?

Mr. Gillies: Extendicare Ltd.

Hon. Mr. Elgie: That is Extendicare.

Mr. Crosbie: Mr. Chairman, I would suggest the minister might raise the point that we should not confuse the first Extendicare offer with the second one.

The first offer, which Mr. King has pointed out would have left the preferred shares in place, was totally unacceptable to CDIC. As I understand it, it would have left the obligations to pick up any deficit on the deposit side with CDIC. That is where the \$80-million deficit occurred.

Mr. Elston: But it was acceptable to you?

Mr. Crosbie: No. We recognized that it would have been a grand solution from the preferred shareholders' point of view, but it would have left CDIC carrying all the losses.

Hon. Mr. Elgie: CDIC's obligations under its statute are just to protect depositors up to the limits of their insurance. Our role was to convince them that it would cost them less in the long run if they totally protected all depositors.

Mr. Chairman: Excuse me, gentlemen. We have two more questioners of the witness, and we have another witness. If we are to complete our business today, are you willing to make it brief?

Mr. Elston: I have one final question relating to the urgency, which you indicated was because of the disappearing or possible vanishing of estates, trusts and agencies business. Basically, what is the relative position of ETA business today as opposed to last January, when Crown Life ETA accounts were transferred to Central Trust Co. administration?

Mr. Thompson: I think a remarkable job has been done.

Mr. Elston: By the staff?

Mr. Thompson: Yes, and there has been a great loyalty that has transmitted over. We have lost a case in court, where the allegation was in effect that Crown, because of its uncertain financial position, was not a suitable trustee. We have something like eight other cases pending. It is not a case we can really effectively argue at this time.

We can, if we complete the transaction that was on the offer and put that over to Central Trust, at least preserve that business to some degree.

Mr. Elston: What is your anticipated downside? Do you expect to lose all of the pending eight actions and the administration of those?

Mr. Thompson: I think we possibly would lose the eight.

Mr. Elston: Do you have an idea of the dollar value?

Mr. Thompson: No. I cannot give you an exact idea. The fact of the matter is that a precedent is being established by the courts, which means that Central Trust, as the administrator of

it, has to accept the fact that it does not--I want to make this point too. A lot of these estates where it is locked into Crown were there for a very specific reason, which may not have been a very popular reason to the beneficiaries of that estate, but they were there for a very good reason.

With the obligation to manage that, Central is virtually put in a position of having actions brought against it and a precedent established and having to acknowledge, without this authority, that at the request of any group, an alternate would have to in effect perhaps consent to transfer that business out to another suitable--

Hon. Mr. Elgie: The same type of legislation, though, will have to be cast in other provinces. We have had meetings and discussions with them, and we understand that they will be proceeding with it to provide the same kind of protection for the ultimate payout to the soft assets committee, with respect to those who have claims on those soft assets.

Mr. Elston: Anyway, you feel that the emergency, or what is perceived as an emergency, warrants the transfer of the ETA assets, under the conditions set out, without any guarantee or whatever of the consideration the preferred shareholders think they ought to have?

Mr. Crosbie: I think we should make it clear that the arrangements were made on the original sale for the transfer of these assets, which did not go over because of the peculiar legal niceties surrounding trust assets. We recognized at the time the Crown Trust legislation was brought in, and it was mentioned at that time, that we would have to come back for a bill to facilitate the transfer of the trust assets over to Central.

The decision on the sale of the assets was really made and argued during the Crown Trust bill. In a sense, we are reploughing the ground that was an issue before this committee when the Crown Trust bill originally was passed.

What we are faced with now, as the registrar has indicated, is that, having committed ourselves to this course of action and being faced with lawsuits which are based on the questionable quality of the existence of the Crown Trust today, the Central Trust is going to be faced with having to make decisions.

Let us assume, for argument's sake, that the committee did not pass this legislation. Then I would think Central Trust would very quickly have to decide whether there is any sense in defending actions. If it stopped defending them, then there could be a rush. None of us on the staff could quantify that for you.

However, if there was any significant erosion of the assets out of Crown Trust into entirely different trust companies--not Central, not Crown--then again the assets that are available to eventually compensate preferred shareholders are being diminished. It is our concern to get on with the transaction which, in fact, was consummated many months ago and prevent this erosion of the assets that provide the value in the transaction with Central.

Mr. Breithaupt: Mr. Chairman, I will not take too long but there are a number of themes that I would like to consider briefly on this bill.

I was going to ask Mr. King about the terms of the operating agency trust agreement. That was available, as I recall, after February 7 this year and it would have materially affected, and has materially affected, the preferred shareholders.

Did you know of the terms of that agreement any earlier? Were you involved in any of the discussions on that which led up to the resolution of that document?

Mr. King: I recall correspondence from my counsel asking if we had a copy of the agreement. I think we had to be quite persistent to get a copy of that, but it was certainly a number of weeks--I think it was March or April--before we got a copy of it.

Mr. Breithaupt: I suppose this would lead then into a discussion, in effect, as to why we are here, and that is, how will Bill 97 affect your position? What are the particular objections that you would have to Bill 97 as it stands now?

Mr. King: Mr. Breithaupt, I think what the registrar and the minister are saying is that it is probably in the interests, and I would have to say it is in the interests, of the preferred shareholders to proceed to try to preserve the ETA business, and that is fine.

My concern is the residual value of that business for which we are not being compensated. That is my comment on that.

Mr. Breithaupt: You may not be compensated for the residual value, but will you not at least receive the prospect of compensation through the protection of a portion of the capital value of the shares if these assets do mature and develop and did something?

Mr. King: Yes, but once it is transferred it is transferred. It is not an agency agreement any more.

Mr. Breithaupt: So that the involvement here then is that the agent is, in effect, becoming a principal.

Mr. King: Absolutely. As you know, the commission, in brokerage terms, is usually twice or three times what an agency agreement is.

12:10 p.m.

Mr. Breithaupt: If that is the case, we see Bill 97, which flows directly out of Bill 215, and I suppose it is a somewhat technical argument but the relationship does change and therefore the preferred shareholders will have lost any opportunity for continuing income from their securities, will they not?

Mr. King: Yes. The asset of the residual value of ETA business in 1988 will cease to exist.

Mr. Breithaupt: You will have then--

Mr. King: It will cease to exist now because the agency agreement of this part of it has actually been terminated.

Mr. Breithaupt: So your ultimate asset, in effect, will be the maturity and otherwise prospects of the list of soft assets which Mr. Thompson shared with us today and the total of that was--

Mr. Thompson: \$225 million.

Mr. Breithaupt: --\$225 million, maybe; and that will be your sole source of expectation of achievement, so far as the preferred shareholders are concerned, if Bill 97 squares up the opportunity for Central Trust to fully deal with the business of Crown Trust. Is that correct?

Mr. King: No. I think you are slightly misleading, Mr. Breithaupt, in the sense that we must recognize that CDIC has a floating charge on that.

Mr. Breithaupt: On that, yes, but the net value will be--

Mr. King: I do not think we can suggest that some years down the line there will be \$225 million available to look after preferred shareholders.

Mr. Breithaupt: Of course.

Mr. King: It is incredible to me that an insurance company--perhaps the CDIC does not operate like an insurance company but it is called an insurance company--has been paid millions of dollars in premiums over the years and, so far as I know, has never had a claim. Oh, I am sorry, there might have been one out in Vancouver years ago.

Normally an insurance company considers it has done quite a creditable job when it breaks even on its underwriting operation; it is investment income that comes forward. What is an insurance company? Does one just go and seize assets to recover your premiums? This is a unique situation.

I suppose one of the frustrations is that we have no say or input or information, no control over how these things are being developed. As far as CDIC is concerned, whatever its loss is, that will attach to this and may well exceed \$225 million perhaps. Who knows? I do not think anybody in this room knows.

Mr. Breithaupt: If that is the case, with this list of soft assets and the claims against it by CDIC on behalf of the shareholders, and the prospect that some of these assets may not achieve the valuations that are hoped for, the net result for the preferred shareholders may be that, if this estates and trusts business and the goodwill prospect of it is transferred, it may effectively be the only realizable asset and the preferred

shareholders could receive nothing when this at least marketable item is removed from any claim they may have.

Mr. King: Yes. I am frankly surprised that CDIC has not spoken to somebody to secure that residual value in the floating charge too.

Mr. Breithaupt: We are back to the forgotten preferred shareholders' theme.

Mr. King: Yes, exactly. Maybe this is the first dent in the CDIC, that it has overlooked the residual value. Maybe there is something in that, but I cannot emphasize enough that it is a valuable asset to have.

Mr. Breithaupt: You have suggested a book value asset of about \$16 million effectively, also an asset which generates income dividends to the preferred shareholders and also a benefit to the administering company from this kind of business. We talked about that in your initial discussion of the possible business solution which involved the multiplier and the other events.

Mr. MacQuarrie: Does that not just deal with the estates, trusts and agencies accounts basically as far as the source of continuing income is concerned?

Mr. Breithaupt: I think so. Perhaps we could hear from the registrar about that last comment. Why would not Canada Deposit Insurance Corp. have any interest in or claim against the value of the ETA business that is now being formally transferred, or the rights, in effect, to deal with it and such like are being formally transferred; or does CDIC still have a claim or feel it has sufficient assets that the transfer of this business is not a major concern to it?

Mr. Thompson: I think what we are really talking about is something that is separate in the agreement with the CDIC and Central Trust.

Mr. Breithaupt: You are really saying then that this agreement is a complementary requirement to the principles that have been agreed to?

Mr. Thompson: Yes.

Mr. Crosbie: Mr. Breithaupt, if I may, I think there is a misconception in part here. What Mr. King is suggesting is that there is some residual value to be sold. When the Crown Trust assets were offered for sale, presumably the purchaser looked at all of the value, including cash flow and the residual value at the end of five years. All of those were considerations that went into their thinking when they determined what they were going to offer for them.

I do not think that at this time you can start porkchopping the deal and say, "If we had a claim for residual value we would get something, and if we had a claim for the cash flow during the next five years we would have something else." I think that was

something that happened at the time. We have a deal now. We got the best price that was possible in the market place at the time and it includes whatever that residual value is at the end of five years. It is built into the offer.

Mr. Breithaupt: So Bill 97 is only before us because several paragraphs were not included in Bill 215? It has no effect, from what I understand you are saying, on what the deal was.

Mr. Crosbie: That is correct. At the time, we debated whether we should enlarge the Crown Trust bill to deal with these issues relating to the transfer of trust assets.

As you may recall, there was urgency at that time. We were concerned about the erosion of assets in the Crown Trust Co. We were not sure how complicated the conveyancing and trust legislation would have to be to deal with this. We did not have Bill 97 drawn at the time. The decision was made: "Let us take it in two steps. We will approve the sale, and then we can come back later when we have thought through carefully and we have had an opportunity to discuss with the other provinces the type of legislation that would be appropriate to transfer the assets over."

So really, that is what we are doing in Bill 97, completing the transaction that was authorized by the Crown Trust Company Act.

Mr. Breithaupt: There are two themes in Bill 215 that I would like to have Mr. King's comments upon.

First, in section 4, in two places we refer to the requirement to obtain appropriate consideration for the transfer of the assets. Second, in section 3, we are told that reasonable remuneration is going to be obtained. Of course, by far the largest portion of any of these ETA fees and commissions are going to be kept by Central and could be viewed as almost an indirect remuneration.

Do you have any observations now, after eight months have gone by since these original proposals were made, as to whether the themes of appropriate consideration and reasonable remuneration are in place?

12:20 p.m.

Mr. Finley: If I might respond to the question that you raised with Mr. King, I have listened with great interest to the statements made by the minister, the registrar and Mr. Crosbie concerning the need for Bill 97. I do not pretend to be a legislative draftsman, and perhaps they are right, but I am driven to the conclusion that this is perhaps not the case.

Bill 215 did provide for the appointment of a substituted fiduciary, which is what Bill 97 is really all about. It provided for that in subsection 41(b). It said, "by an agreement, the registrar has the power and authority to appoint a substituted fiduciary."

Later on in Bill 215 there are two sections stating that when an agreement has been entered into by the registrar appointing a substituted fiduciary, all of the responsibilities and all the powers flow to the fiduciary and indeed the courts are to take cognizance of such an agreement.

Subsection 4(3) does state that in the appointment of a substituted fiduciary, "the registrar is required to do so for such considerations and on such terms and conditions as he sees appropriate."

What is happening is that the fiduciary was not substituted by the agency agreement. There was provision in there that it would be done at a later date, but it was not provided for. The registrar is not entering into an agreement to appoint a substituted fiduciary. He is asking the Legislature to do it.

By that means, I think in law at least, he is avoiding his responsibility under subsection 4(3) to make a determination as to the appropriateness of the consideration. I, for one, would be interested in the registrar's response to that specific question. Does he feel that what is being paid to Crown Trust under the existing agency agreement--in that this is all Crown Trust and Crown Trust preferred shareholders are going to receive for the ETA business--does he feel that five per cent of the gross revenues for a period of five years is appropriate consideration?

Mr. Thompson: Let me deal with your first question. I did, in fact, appoint Central Trust as the substituted fiduciary under that agreement, so I did not try to abrogate my responsibility or in any way push this over on to the Legislature. That did not work. We tried that in court and that is why we are back here.

Third, if you want to comment about it, comment about the whole agreement, don't piece it off and say you can look at one segment, whether it was a good deal or not. Nobody else came close to the offer that Central made. That we do know.

Mr. MacQuarrie: How many offers were there?

Mr. Thompson: Five, all told.

Mr. Breithaupt: What was the sort of range of that, compared with the \$20 million that was the Central package?

Mr. Thompson: You get down to practically a range of zero return roughly on two of them, which was just a takeover, and something around \$2.5 million, and if I recall correctly something around \$5 million, so you had nothing near the Central offer.

Mr. Boudria: Can I ask something on that? What was the Crown-Extendicare offer?

Mr. Thompson: The valuation put on that was that roughly \$2.5 million would have been the result.

Mr. Boudria: How does that compare with their first

offer?

Mr. Thompson: You cannot compare the offers, I am afraid. They are entirely different offers.

Mr. Renwick: Could we have those, Mr. Thompson, the agreements you entered into for the substituted fiduciary and the court decision with respect to the ineffectiveness of it?

Mr. Thompson: Yes.

Mr. Finley: Mr. Chairman, if I may respond to the comment Mr. Thompson made about the substituted fiduciary, I would like to quote subsection 8.7(i) of the Agency and Operating Agreement, dealing with the personal estate section of the business of Crown Trust Co. It says: "Subject to section 1, Central Trust shall administer and manage as agent, and as fully as is required of Crown with respect thereto, the personal estates and trusts for which Crown was acting in a fiduciary capacity at the effective date.

"On such date or dates as shall be agreed between Central and the registrar, Central shall become the substituted fiduciary."

This agreement does not appoint them as the substituted fiduciary. It provides for a subsequent agreement between Central and the registrar, and I stand by my earlier comment.

Mr. Renwick: Mr. Thompson, you entered into an actual agreement, purporting to effect the substitution of the fiduciaries under the various trust arrangements.

Mr. Thompson: I have it here. I have made an appointment of them. It is just being photocopied now.

Mr. Renwick: An actual appointment?

Mr. Thompson: Yes.

Mr. Renwick: And if it had been in law effective, you would not be here today. Is that what you are saying?

Mr. Thompson: Well, no.

Mr. Crosbie: I agree with Mr. Renwick. There were some concerns about the convenience of not having to go into the registry office and meet them--

Mr. Renwick: I understand the convenience argument.

Mr. Thompson: Yes.

Mr. Renwick: All I am asking is a pure and simple legal question. Are you saying, not as a matter of convenience, that the substitution in the exercise of the authority that you were given under the agreement was not effective in law?

Mr. Thompson: It was before the courts. I will have to refer to counsel, if I could, on that, sir. But that is my understanding of it, yes.

Mr. Renwick: The charge which counsel for Mr. King made was that you had not exercised your authority under the particular section of the agreement, by appointing a substituted fiduciary, and that part of the exercise of that authority was a determination with respect to consideration. That is what I understood the statement was.

Mr. Finley: Mr. Renwick, that is correct.

Mr. Renwick: Then I understood you to say, sir, that you had in fact exercised that authority, which was your responsibility. That was your answer to counsel's comment to you.

Mr. Thompson: Yes, we had entered into the agreement.

Mr. Renwick: Then you said that it was not effective.

Mr. Thompson: Yes.

Mr. Renwick: All I am asking is, can we have the documentation showing that exercise?

Mr. Thompson: Yes. It is being photocopied now.

Mr. Renwick: I think that is a different question to this.

Mr. Mitchell: While we are waiting for that material, may I be informed about your direction or what the direction of the committee is? We had agreed at the last meeting that we would hear certain witnesses today.

To this point, we have not completed those on the list. We had agreed we would hear certain witnesses on the motion from Mr. Breithaupt and complete clause by clause this morning because of the limitations on proceeding into estimates beginning tomorrow.

We do have a time problem, and I would appreciate knowing what direction the committee proposes we should go in to complete our duties assigned to us for this morning by agreement of the committee.

Mr. Breithaupt: I must say that the questioning and the details were somewhat longer than I expected this morning. I am virtually finished with Mr. King. Could we agree to hear Mr. Chittenden tomorrow for a fixed half an hour, or whatever is wanted, and then begin the estimates? Is that a possibility?

Hon. Mr. Elgie: Clause by clause.

Mr. Breithaupt: Clause by clause. I recognize that tomorrow, because of some of the particular debates in the House, no doubt members will be interested in that as well, but could we

agree to have tomorrow afternoon's session clear up this bill and that the Ministry of Consumer and Commercial Relations leadoff would be on Friday?

12:30 p.m.

If there is a time problem, could we agree to deduct an hour or two from the CCR if necessary to try to get this, on balance, attended to, without compromising the understanding we had that we wanted to deal with CCR? In effect, this is dealing with one of the major themes that would come up in estimates. Might that be a suggestion?

Mr. Mitchell: I do not want to appear to speak for the committee, but if time allows that we can establish and allow a certain period of time tomorrow to complete--and I am taking the member at his word on this, that we would complete it--I think we would be prepared to do so.

I recognize the concerns of the member for Riverdale (Mr. Renwick) that we have the adequate time for estimates. Perhaps I could be assured that we are not hindering ourselves in the proper dealing with the estimates of the Ministry of Consumer and Commercial Relations. Perhaps the clerk can tell me. Do we have sufficient time that we could allocate any time tomorrow at all?

Mr. Hodgson: It was suggested by Mr. Breithaupt that we have two hours taken off estimates time to allow time to deal with the matter before us this morning.

Mr. Mitchell: I am prepared, personally, to accept that if the committee is.

Mr. Boudria: Just a minute now. If I have been listening attentively, I think what Mr. Breithaupt has said is that if we go beyond tomorrow it would be taken from estimates time.

Mr. Breithaupt: Again, it depends on the time that we have available to us.

Mr. Hodgson: It depends on whether you want to be here Christmas day or not.

Mr. Breithaupt: I think that is so. I think the expectation is that the Legislature will likely adjourn on December 16 and that would give three weeks. Usually in a week's time there is about six or seven hours of estimates time in the Wednesday morning, Thursday afternoon and Friday morning.

I would be certainly content if what was 20 hours for the Ministry of Consumer and Commercial Relations became 18 hours and began on Friday morning on the basis that this is an issue that is involved.

Mr. Mitchell: Would you be prepared to make that as a motion? I think it is something we could support.

Mr. Breithaupt: I would prefer a consensus on things like this because I do not want anyone upset by my giving some time away, but I think that would be a nice way of sorting out the balanced concerns to hear the witnesses on this particular theme. Of course, even 18 hours in CCR will not deal with an awful lot of issues.

Mr. Chairman: Do I hear a consensus?

Mr. Breithaupt: I do not want to compromise Mr. Renwick or my colleagues in my own party. It is just a suggestion that might sort it out.

Mr. Gillies: I just want to assure you, Mr. Breithaupt, we share your concern that this matter before the committee today have an ample time to be examined properly. We would not want to see any member of the committee rushed.

However, as my colleague has pointed out, there is a concern. The clerk just told me that if we use all of the time available to us from now until the adjournment of the House we will just barely get through the estimates. I think that your proposal is very wise. I think it is a good one and I cannot see why we would not support it.

Mr. MacQuarrie: Mr. Chairman, I think that the suggestion is really not that much out of line because, as Mr. Breithaupt has pointed out, the material we are covering today is material which would have been covered fairly extensively in the consideration of the estimates anyway.

Mr. Renwick: Mr. Chairman, my position is as I stated it the other day. We have 20 hours for an immensely complicated government ministry which is in deep trouble, and now we are going to chop and change it at the expense of someone else. I do not think we can do that.

We are also not aware as yet whether the government intends to refer the architects and engineers bills to this committee to have them passed before Christmas. If we start backing up our time, we are not going to be able to accomplish our task.

You must remember that this ministry includes the Ontario Securities Commission, all of the business and financial institutions, the Housing and Urban Development Association of Canada questions and any number of questions of immense importance. I do not think it is up to us to alter the agreed number of hours which were allocated after serious consideration at the time the original allocation of time amongst the estimates was made.

Mr. Chairman: Mr. Renwick, possibly to accommodate your concerns, would it be possible for the committee to sit an extra hour the following Wednesday, start at nine o'clock and pick up the extra two hours? Would that be agreeable?

Mr. Renwick: Whatever the House says about when the committee will sit, I am quite agreeable to it.

Mr. Breithaupt: Certainly, that would be another way of dealing with it. Again, I do not want to make a motion because I do not think it should work that way. Perhaps we could agree that we will complete this bill tomorrow and we will seek an agreement that we sit perhaps an extra hour on the following two Wednesdays, starting at nine o'clock instead of 10. Hopefully, everyone will be compromised, including those of our colleagues who are interested in one issue and will be a little upset if they do not get their chance. I am trying to be fair. I really am.

Mr. Mitchell: We will accept that, Mr. Chairman, provided the consensus is that we complete this bill tomorrow.

Mr. Chairman: It is. That is what we are agreeing to.

Mr. Renwick: That we complete this bill tomorrow, yes.

If you will allow me a comment. The Legislative Assembly Act says that the commissioners of estates should look at every estate bill. This is an estate bill. I tried to raise this matter before. It is true that if this bill had come forward to this assembly as a private bill by Central Trust or by Central Trust, on the application of Central and Crown Trust, that the commissioners of estates under the Legislative Assembly Act, who are there to guide and assist the committee, should give us the benefit of their advice.

I am not speaking now about the preferred shareholders or anybody else's interests. I am speaking about the pure question of the nature of the bill, which is in front of us, respecting the substitution of fiduciaries for all of the various documents that are referred to in that.

I may be unduly concerned about the law of trusts in the United States, but I happen to think that it is probably the most important bill we will have before us, from the point of view of the legalities of the matter. If a private company had brought such a bill and asked for a substitution, we would have automatically had the judges of the court, who are the commissioners of estates, look at the bill and give us their opinion and report with respect to it.

Again, I do not draw arbitrary divisions. The estimate that I hear is that we are substituting for trust documents of one kind or another or various fiduciary documents, Central Trust for Crown Trust. I do not think we can simply say that we are going to pass the bill because the government comes and tells us that it is important. I understand that it is important. I am quite pleased that the bill is before us so that it is done in a proper and formal way.

But if we think we are carrying out our responsibility without at least having some guidance from the judges of the court with respect to its effectiveness, then I do not think we are discharging our responsibility. We are not discharging our responsibilities either to the persons who appointed Crown Trust as trustee, fiduciary, or whatever the nature of the various

documents is, or to the beneficiaries. Because we have the power to do, it does not mean that we can discharge it in some casual manner. That is what concerns me.

12:40 p.m.

I think the judges should be asked to look at the bill. I am not interested in getting into technical discussions about whether this is a private bill or a public bill or anything else. If the clerk will just read the section of the Legislative Assembly Act, I think it would be clear that it is the advice of wisdom. I raised this at least a couple of weeks ago on the question. I think it is important for us to have that assistance.

I have no difficulty in wanting to see this bill passed as early as possible. That is not my problem. My problem is to see that we do it properly and conscientiously rather than commit myself that tomorrow morning we are going to pass this bill.

We should proceed tomorrow with the estimates of the ministry. I think the bill should be referred, on motion of the committee, to the commissioners of estates. Something should be done to say that we have made an effort to get the kind of report we would have got had Central Trust and/or Crown Trust come before us with this bill. If there is something wrong with my logic, if there is something that leads me to believe we should casually pass this bill tomorrow morning without fully understanding all the implications of it and without the kind of professional advice the Legislative Assembly Act calls for, I think we are being very unwise.

Mr. Breithaupt: Is there an opinion on the commissioners' matter?

Mr. Renwick: There is an opinion. The clerk would simply say it has never been done with a government bill. That is not my problem as to whether it has ever been done or not.

Mr. Chairman: I wonder whether the committee has the power to do what you suggest. As you are well aware, you referred it to the Attorney General (Mr. McMurtry) as well as to the clerk. I did have a personal conversation with the clerk.

Mr. Renwick: That was the most serious mistake I ever made. It was a mistake when we referred it to the clerk. It is now a mistake to have referred it to the Attorney General. Of course, he will say no. Why not? He is a member of the government. His interest is the government's interest.

Mr. Chairman: You did not let me finish. I had taken it up with the Attorney General's office and I was hoping to have his answer for you today or tomorrow. I think we can get that answer, hopefully, by nine o'clock tomorrow morning.

Mr. Breithaupt: Just so this matter is clear, is it your intention or perhaps you already have read into the record this memorandum so that does appear in Hansard?

Mr. Renwick: Yes. We did that last time.

Mr. Breithaupt: I was away on Friday, so I did not know that.

Mr. Renwick: I believe you read it in.

Mr. Chairman: Yes, I read it in.

So we have agreed to proceed with what Mr. Mitchell and Mr. Breithaupt suggested. We will do the clause by clause tomorrow?

Mr. Renwick: The bill is not going to be referred to the commissioners? That is what you are saying?

Mr. Chairman: That is right.

Mr. Renwick: I would like that recorded. I move that Bill 97 be referred, pursuant to the Legislative Assembly Act, to the commissioners of estates for consideration, to report through the Clerk of the House to this committee with respect to the provisions of the bill.

Mr. Chairman: Could we have a discussion on the motion?

Mr. MacQuarrie: I was wondering if I could move that Mr. Renwick's motion be tabled, at least until we get the opinion of the Attorney General.

Mr. Breithaupt: In speaking to the suggestion made by Mr. MacQuarrie, I would certainly like at least to see that opinion before we voted on the motion. Could we agree that we would discuss that matter immediately after we complete our witnesses tomorrow and before we go into the clause-by-clause session? If the committee decides that is the case, it will happen. If it does not, we will go into clause by clause, I suppose. Might that be a way of handling it, if my colleague Mr. Renwick is content?

Mr. Renwick: Knowing as I do the way the government operates in these matters, we will proceed with clause by clause tomorrow morning. If someone wants to move a motion to table that motion that I put, I would be glad to vote against it. The motion to table is, I assume, always in order, but I would like to have the opportunity of voting against it.

Mr. Elston: I thought we were not able to table a motion to this.

Mr. Renwick: I assumed that the ministry of their own volition would want to support the suggestion that under the Legislative Assembly Act this bill go to the commissioners of estates so that we can have their report. I think they should be as interested as I am in what our responsibility is and not try to hide either behind the Clerk of the House or the Attorney General on the question.

Mr. Mitchell: Could we have a motion to table? Is that motion in order?

Mr. Chairman: We have a motion not to table, but to postpone until tomorrow.

Mr. Breithaupt: Do you think that a motion to table is the custom within the committee. The clerk can give us guidance on that. There is a motion now before the committee. If the time otherwise for the adjournment of the committee has been reached, then I presume we would deal with that motion when we returned.

Mr. Renwick: I move the adjournment of the committee.

Motion agreed to.

The committee adjourned at 12:47 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CENTRAL TRUST COMPANY ACT

THURSDAY, NOVEMBER 24, 1983



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Kolyn, A. (Lakeshore PC)
VICE-CHAIRMAN: Mitchell, R. C. (Carleton PC)
Breithaupt, J. R. (Kitchener L)
Elston, M. J. (Huron-Bruce L)
Eves, E. L. (Parry Sound PC)
Gillies, P. A. (Brantford PC)
MacQuarrie, R. W. (Carleton East PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)
Stevenson, K. R. (Durham-York PC)
Swart, M. L. (Welland-Thorold NDP)
Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Boudria, D. (Prescott-Russell L) for Mr. Spensieri
Williams, J. R. (Oriole PC) for Mr. Mitchell

Also taking part:

Elgie, Hon. R. G., Minister of Consumer and Commercial Relations
(York East PC)
Gillies, P. A., Parliamentary Assistant to the Minister of Labour
(Brantford PC)

Clerk: Arnott, D.

From the Ministry of the Attorney General:

Revell, D. L., Legislative Counsel

From the Ministry of Consumer and Commercial Relations:

Thompson, M. A., Superintendent of Insurance, Financial
Institutions Division; Registrar of Loan and Trust
Corporations

Witnesses:

From Crown Trust Preferred Shareholders:

Chittenden, R. F., Member, Management Committee
King, C. W., President, Hughes King and Co.

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, November 24, 1983

The committee met at 3:37 p.m. in room 151.

CENTRAL TRUST COMPANY ACT
(continued)

Resuming the adjourned consideration of Bill 97, An Act respecting Central Trust Company and Crown Trust Company.

Mr. Chairman: I see a quorum; the meeting will come to order. Prior to going into the regular business I certainly would like to discuss a matter with the committee. Unfortunately, I am one of the speakers on the private members' bill on the nuclear arms free zone, and the deputy chairman is away on other business. I was wondering whether, with the unanimous consent of the committee, we could ask Mr. Eves to be the acting chairman until I return.

Mr. Renwick: It is quite agreeable to me. I know you find that hard to believe.

Mr. Chairman: Thank you. With that, Mr. Eves. Thank you gentlemen.

The Acting Chairman (Mr. Eves): I believe, when we left off yesterday, Mr. Wallis King of Hughes King and Co. Ltd. was the witness appearing before the committee and that there was one more member of the committee, Mr. Boudria, who wished to ask Mr. King some questions. Mr. King, would you please come forward?

Mr. Boudria: If I may, to correct the record, I do not think that Mr. Breithaupt had completed his questions, although he has not yet arrived and I am unsure--

The Acting Chairman: Perhaps you could proceed and then we will ask Mr. Breithaupt later.

Mr. Boudria: That is fine. It was just to indicate to you I am not sure whether he has asked all that he wants to ask.

Mr. King: Excuse me for just a moment. Mr. Chairman. It might be appropriate to point out that you are my member for Parry Sound and I am pleased to have you chairing me.

The Acting Chairman: You do not have to appear before this committee.

Mr. King: Oh, no.

Mr. Renwick: Ask him if he voted for you.

The Acting Chairman: I do not think I want to know the answer to that.

Mr. Boudria: I believe that at the closing the other day we were discussing with the registrar just where we were at with various items, one being the Canada Deposit Insurance Corp. loss, which was in the neighbourhood of \$80 million. Right?

3:40 p.m.

Hon. Mr. Elgie: What we said was that it is my recollection that to date, \$80 million has been paid out by CDIC.

Mr. Boudria: Okay.

Hon. Mr. Elgie: There is no record of it. Frankly, I do not know whether they have had any guarantees or anything.

Mr. Boudria: Fine. Now when will this claim by CDIC take place?

Hon. Mr. Elgie: It is a floating charge now, is it not?

Mr. Thompson: Yes, it is. I think we might be clouding the issue talking about the CDIC. In effect, they are obligated to provide liquidity. What they have done is taken a floating charge and all the assets and they are providing money for liquidity purposes.

They are taking assets in return for that loan. I think the real way of looking at it is to look towards the soft assets and perhaps forget about the CDIC claim for the time being, because that is going up and down all the time, and really to look more to the soft assets of the \$225 million.

It really boils down to the amount that will be ultimately recoverable on the Cadillac Fairview mortgages. That is what is really going to determine--in the long haul, at the end of the term--what would be available for the preferred shareholders.

Mr. Boudria: But you were indicating to us that in regard to the value of these soft assets, apart from the sale of them, you had no idea what anything was worth at the present time and that it was so iffy you did not even want to speculate as to its current value.

Mr. Thompson: No, I think that, all things being equal, we will probably recover on the Daon deal.

Mr. Breithaupt: And that is significant?

Mr. Thompson: That is going to be five years down the road. I guess this is the difficult position that I personally feel myself in, to give an answer that can be sort of followed up on. I do not want to hold out a promise or expectation that may not be there.

These are very difficult assets to recover but, as I said,

some of them are written off. We will just keep pursuing them and pursuing them. If those assets come in, CDIC will be out, and it will ultimately be--at the end of the road--the amount recoverable that is recovered.

Mr. Boudria: The last day we were in here, yesterday, there was quite a conversation going on between Mr. King and the registrar reviewing various actions that have taken place since January. I think this really begs for the following question. How many meetings have you had between the registrar and your group since January?

Has there been, in your view, Mr. King, a sufficient number of meetings to keep you informed as to what is going on? How would you characterize the events from January until today in so far as the communication that you have had?

Mr. King: I think it is a very appropriate question. Yesterday, in my opening remarks, I was rather harsh on my minister, Dr. Elgie, and I felt bad about it. I did spend some hours last night reviewing the situation in case I felt that I was not justified in my remarks. I cannot, looking through my telephone calls, ever say I have had a call returned from the minister or his deputy minister.

To clarify the position, I have had a good response from the registrar and his assistant, Mr. Terhune. I do feel that those gentlemen are concerned about the preferred shareholders.

The problem I have is the complete lack of communication. Two pieces of correspondence have gone out to the preferred shareholders from the registrar. The first piece is an undated letter, which I believe went out in April. It simply tells the shareholders that there is a liquidity problem and the dividends will not be paid.

Between Mr. Thompson and myself--perhaps the minister knows--a liquidity problem does not mean much to a shareholder. He can still go into his branch, deposit his money, and take it out and so on. To simply say that there is a liquidity problem and you are not going to get your dividends is not a satisfactory communication to shareholders.

Mr. Boudria: It did not tell the whole story, to put it mildly.

Mr. King: I think if the letter had said, "We regret that we cannot pay you," you might have even been sympathetic.

The next communication was May 18. It is a page and a half of rather complicated things, saying there is a problem, that Woods Gordon and so on are being asked to perform services, that Peat Marwick and Partners had been reappointed, and that an audit would be forthcoming as quickly as possible. That is from last May.

It is impossible to estimate what kind of funds are coming, etc. Again, to an experienced person, it would be understandable. But the type of shareholders I have been talking to simply do not

understand what is going on. Somebody has screwed up the deal, or messed up the situation.

I might add, Mr. Boudria, that I have been forwarded correspondence from a number of crown ministers, and it is quite obvious that they do not understand the situation. I quote a letter from Mr. Dennis R. Timbrell, the member for Don Mills, to Mr. Chittenden, whom you will have the pleasure of meeting shortly.

It says, "Such a situation is quite different from a case where a businessman is investing his own money and is prepared to take substantial risks in the hope of correspondingly large profits."

Everybody knows that you do not buy preferred shares to make a huge profit. You buy for a dividend and security.

Mr. Boudria: He is saying this in trying to differentiate between the depositor and a preferred shareholder--is this the context in which it is in?

Mr. King: Well, yes.

Mr. MacQuarrie: Mind you, it depends on the nature of the preferred share, too.

Mr. King: Yes, if it is a convertible preferred share.

Mr. MacQuarrie: Yes, right.

Mr. King: But we are talking about a regulated industry and a preferred share that, in fact, is retractable in five years.

Hon. Mr. Elgie: May a copy of that letter be provided to the committee, so they can peruse it as well?

The Acting Chairman: Certainly.

Mr. Renwick: If I may, on this question: This was not some kind of a speculative investment. Both prospectuses under which the shares were offered carried the opinion of Tory, Tory, DesLauriers and Binington, in one case, and I guess it was Campbell, Godfrey and Lewtas in the other case.

In substance, they said the series B preference shares--it is identical in the prospectus for the series A shares, subject to change in wording--"would be eligible for investments under the federal and provincial statutes referred to below, without resort to the so-called basket provisions of such statutes, by insurance companies regulated under the Canadian and British Insurance Companies Act and the Foreign Insurance Companies Act and under legislation of Ontario and Quebec governing insurance companies."

3:50 p.m.

They would also be eligible for investments by "loan companies and trust companies regulated under the Loan Companies Act, Canada, and the Trust Companies Act, Canada, under

legislation of Ontario governing loan and trust companies and under legislation of Alberta governing trust companies; three, pension funds regulated under the Pension Benefits Standards Act, Canada, and under legislation of Alberta, Ontario and Quebec governing pension funds; and four, a trust governed by a registered retirement savings plan or by a registered home ownership savings plan regulated under the Income Tax Act of Canada."

The point that I tried to make with the minister yesterday was that the legalities of the difference between a preference share and a more secure position is not the point. These are, as that opinion indicates, very conservative--if I could use that term in this connection--investments for anyone and I think to raise even some minor question that somehow or other this was a piece of moose pasture that they were buying, when you were talking about Crown Trust Co., seems to me to be not only facetious but quite uncalled for in relation to any element of speculation.

Hon. Mr. Elgie: Mr. Chairman, I cannot leave that unanswered because the member knows full well that this was not a guaranteed investment certificate with an interest return income. It was an investment because of certain tax advantages that flowed from it and he knows it. It is a preferred share which becomes part of the asset base of the company and income from it depends upon the management of that company. It does not carry the guarantee that flows with deposits and no matter how you cut the cake, it still is a share investment.

Mr. Boudria: What about a company manufacturing calculators?

The Acting Chairman: Mr. King, have you finished your comments?

Mr. King: Yes.

Mr. Gillies: I do not understand the legal distinctions. I am talking about the moral obligation of the government of Ontario and when they substitute legalities to defeat the moral obligation, I get a little bit upset.

Hon. Mr. Elgie: Well, I get upset when you raise the moral obligation because I think it would take a great stretch of the imagination to imply that this government's actions in this case have not been swift and appropriate and in the best interests of all parties.

The Acting Chairman: I think we should allow Mr. King to proceed with his comments.

Mr. Renwick: I think that is wise.

Mr. King: To respond to Mr. Renwick. In the prospectus--now these are not government documents, though they are approved by a branch of the ministry--April 5, 1977, issuing on the Loan and Trust Corporations Act, it says, "The company is

registered as a trust company under the Loan and Trust Corporations Act, Ontario, and its operations"--and it is two-phased--"are subject to inspection and supervision by the registrar under the Act."

What is interesting in the Central Trust prospectus of last May, is that it says Central Trust is regulated by the trust company. It does not say anything about supervision and inspection. That would suggest that there is a lower degree of supervision during the intervening period.

But I just respond to your point that there is a degree of difference between this industry and simply a preferred share of Stelco or Whodoneit Ltd.

Mr. Boudria: A few more questions, Mr. Chairman. What I am trying to arrive at is to establish the fairness in the manner which the preferred shareholders have been dealt with. That is the reason I asked the previous question as to the kind of liaison that you had with the minister's office. I gather, from your past remarks, they have not been too numerous at best.

Mr. King: This is a feeling on my part, but I feel we have been circumvented. I can go back to correspondence of December 30. Having seen the deputy minister, I wrote a letter to Mr. Stewart, executive vice-president and chief operating officer. This was before the seizure took place, when I was acting on behalf, at that time, of the Series A preferred shareholders. I wrote to him in frustration and said:

"Having been to the government, we believe that there are a number of remedies available to these shareholders. However, to serve their interest and acting on behalf of all shareholders of this class, it is our view that this matter could best be resolved by Crown Trust purchasing or redeeming such preference shares as provided in the provisions at the time of issue. May I hear from you at your early convenience."

I never got a response to that.

Mr. Boudria: That was what date?

Mr. King: December 30. You know, my involvement started, gentlemen, on October 10, recognizing that there were serious problems in the wind. I spoke with Mr. Crosbie. I do not have the date at hand, but I think it was November 30 or towards the end of November.

On January 26 I wrote to Mr. David Richardson of Clarkson Co. Ltd.--you will recall they are the people who are acting on behalf of the government--as to certain business proposals and things like that. I said, "We see no reason why an arrangement utilizing the financial support of the Canada Deposit Insurance Corp. and the government of Ontario with respect to soft assets cannot be combined with continued existence of Crown Trust Co."

This is where I asked if we could, as preferred

shareholders, manage the company. Again, no response to that. It is extremely poor business practice.

Just to respond to the fact of the support or lack thereof we have had, again, I know it is not your wish to go into the legal solution, but we wanted to clarify a few points, but the minister's legal counsel fought us all the way through the divisional court, the Supreme Court, the Court of Appeal. I am not a lawyer so I do not know all these courts, but right up to the point. All we were trying to find out was whether the legislation was constitutional or not. Our lawyers have a concern as to the constitutionality. If he is trying to help us, why does he not help us find out in front whether the thing is legal or not?

I find, with all due respect for the honourable minister, that I frankly do not feel I have had the support or the interest or concern that I referred to yesterday. I regret, Mr. Minister, having to use such language.

Even the court says, in the decision of Mr. Curry, if I might read just one sentence: "The interest of the parties appearing on this application, as well as those of others concerned with the eventual outcome of the issues raised (for example, the interveners)"--that is, the preferred shareholders--"will best be served by the trial process."

How does the court or the ministry expect us to fight a trial process for the next 10 years? It is ridiculous.

Mr. Boudria: The next question that flows from that is, I am trying to find out the kind of liaison that you had with the ministry versus, say, the preferred shareholders in Seaway Trust Co. How have others been treated?

Mr. King: As I understand it, the Midland Bank Canada had a security through its parent company, a debenture loan, and as security had the preferred shares of Seaway. As a result of the seizure that became part of the security. The government saw fit to appoint the Midland Bank Canada as the manager of those assets.

Of course, this leads us to another problem. One of our major concerns is that a transaction could be consummated to have the common shares of Crown Trust sold and the preferred shareholders would be still left there because it is not in bankruptcy.

As a matter of fact, at the last meeting of the preferred shareholders committee on November 7, a resolution was passed by the committee requesting that C. W. King and the committee attend upon the Minister of Consumer and Commercial Relations--I do not know how much success I would need to have had to have got hold of you, Mr. Minister--"the registrar or other government representatives to seek (a) a written undertaking that efforts be made as soon as possible and be completed within the next 12 months to realize upon the soft assets and particularly to realize upon the Cadillac Fairview third mortgages by way of power of sale; (b) an affirmation by the provincial government that after

payments to depositors, creditors and CDIC, that preferred shareholders rank first in line to the distribution of assets."

As you can see, the concern we have there is that somebody will come along and offer a few million dollars for the common shares and we would still be there with a new owner.

4 p.m.

Mr. Boudria: Or somebody could come along and dispose of the estates, trusts and agencies portfolios at bargain prices.

Mr. King: Well, there is absolutely no consideration for the residual value.

No, we have concern. Mr. Thompson and Mr. Terhune have been keeping us advised as to when financial statements will come. They were promised for the end of June and I appreciate the problem because I am sure, as you know--most of you who are familiar with accounting procedures and subsequent event clauses--I am sure they will be more than a few pages.

But even if we get the financial statements, the problem is, what is the value of these soft assets? Auditors are not liquidators, so it is going to be questionable of what use these financial statements will be to people who are not running the show.

Mr. Breithaupt: I wanted to follow through, having come in several minutes after we began, to review that comment that Mr. Thompson had made about the concern with respect to the soft assets and the fortunate likelihood that the Daon Development Corp. investment in Vancouver may well prove to be of value.

You then suggested, as I recall, that part of the difficulty in looking for an eventual benefit to the preferred shareholders or even the common shareholders would be the likelihood of the recovery on the Cadillac-Fairview mortgage wraparound situations.

Now that eight months have gone by--nine months since this first burst upon the scene--do you have any opinion as to the likelihood of value being in those mortgages? Is it simply too soon to tell, or do you see the prospect of recovery, if it is fair to give that opinion?

If you cannot do it, then you cannot. But is there at least an educated guess on those values and do those values depend on any recoveries that might result from success in the actions against Mr. Rosenberg and the other individuals involved?

Mr. Thompson: Yes. I think that is precisely the case. This is being litigated and it is not a case where you go in and get a consent judgement and then grab the property and sell. Everything, I think it is fair to say, is being fought inch by inch down the line.

There is an equity in those properties, obviously--I don't know how much. Anything I would say would be highly speculative,

but there is an equity there. At the time--and if it happens--that there is a recovery and the properties are put up and realized, a lot will depend on what the value is at that particular time when they are put on the market and sold, if that eventuality comes.

Mr. Breithaupt: So the value, as well, will --

Mr. Thompson: Again, you know, I am handcuffed by saying I don't know, honestly.

Mr. Breithaupt: The value would depend, and the prospects of recovery would depend on negotiations with the owners whoever those owners may be.

Hon. Mr. Elgie: I don't think anybody could even say with any certainty, James, who owns the properties. The evidence that has come forth in the Cayman Connection would suggest that there was no arms-length transaction that took place. So does that mean that the numbered companies that are now named companies are still the owners? There are some who speculate that Kilderkin Investments Ltd. might even be the owner. So those are issues that will also have to be resolved.

Mr. Renwick: It is a kind of intricate operation, but certainly in any theory of mortgage law they are closed out.

Mr. Breithaupt: Once they are known.

Mr. Renwick: Well, whether they are known or not. Presumably they are.

Hon. Mr. Elgie: If you review the action that we started in February, Jim--the rescission action, actually--it reserved the right to exercise that option that the primary object to date has been the rescission of the mortgages.

Mr. Renwick: What option?

Hon. Mr. Elgie: Down the road, there was an option to--

Mr. Renwick: --foreclose out the equity if there is a continuing default on that.

Hon. Mr. Elgie: Then you would have to make the decision whether a fire sale of those things is in the best interests of the shareholders or whether one should pursue the option of a variety of offers that may come forward and may be coming forward.

Mr. Renwick: I just wanted to clarify in my mind. I had always, in my simple-minded way, said that if you are going to move to foreclose them you might as soon find out who the hell they are.

Hon. Mr. Elgie: The writ is in the alternative, so that option is there.

Mr. Breithaupt: Just to complete my line of questioning of Mr. King, which brought out a number of themes yesterday, we

have seen the connection, Mr. King, between your views of the preferred shareholders in Bill 97 and you have talked about that five per cent theme and as well, the cash flow you expect.

Other than the views on that as to the concern and the business solution that you had suggested, was there anything else that you had to offer us a further alternative to the actions that are in Bill 97?

Mr. King: Obviously, the five per cent is an accomplished situation and we were not consulted on that, of course, but the residual value I come back to.

It may be possible--I gather that there were not any discussions or inclusions as to what might be done with the preferred shareholders when the agreement was executed with Central Trust--but if we have a time for leverage maybe it could still be done.

We are talking about, as I mentioned yesterday, a dividend flow and as I said, these people are living on this dividend and we are talking about \$2.5 million a year. If there is a reasonable prospect for eventual recovery, I think a transaction could possibly be considered in seeing if something cannot be worked out with Central Trust.

But I cannot operate in an oblivion. Unless I have some support--I know from the registrar that he was interested in my thoughts on the thing, but nothing has germinated. But I think that there is a genesis there of a solution and perhaps with this residual value concept, \$10 million would not be unreasonable if there is \$1 billion left at the end of the piece which Central Trust is getting for nothing. So it may well be an opportunity to twist Central Trust or to consider working up a solution.

I would be happy to work with the minister and the registrar to see if something could not be done in that area. I think it is an opportunity that should not be overlooked. I have not, I do not think, left one stone unturned and I think that we must not forget about the shareholders.

Mr. Breithaupt: Following the comments of the registrar earlier on, it is my understanding that the views of valuation for those assets, even as you have set them out, were no doubt part of the consideration of the purchase price.

Therefore, perhaps the registrar would answer whether he sees any prospect of negotiations being successfully completed with Central Trust that would present opportunities to the preferred shareholders to at least acquire some income flow against the day when these soft assets might bring them back some or all of the value of that \$18 million-plus which was the value of their preferred shares at the time of the event by which Central now has the operational control of Crown.

4:10 p.m.

Mr. Thompson: I cannot hold any expectation of that out

at the present time, because I am sure that Central want assets in return for that obligation. Otherwise, there is no base for assuming.

Ultimately, down the road, certainly the extent of the agreement has been that these soft assets have to be worked out. Now, if they can get worked out some time down the road, yes, there may well be a position, because I do not think that either ourselves or the Canada Deposit Insurance Corp. want to-- Ultimately you are going to get, in some years ahead to the stage, where you want to close the books on this.

Mr. King: Can I just ask the registrar something? If you feel that the soft assets have a book value of \$125 million, say--I think you said \$2.25 million but let us even it at \$100 million--if you were to assume 20 cents on the dollar or something that will give \$19 million.

Would the ministry have the co-operation or the goodwill to do a share exchange offer, let us say at eight per cent or something, and nine per cent on the preferred shares, place the soft assets in Central Trust at 20 cents on the dollar, so they would have that multiplier effect at 20 cents on the dollar? I would have to think there is 20 cents on the dollar even from the Daon project.

If you could see a way to having a solution that way, then I think I could recommend to the shareholders some sort of accommodation that way, because they will have the cash flow from the increased depositing capacity to service it. Of course, this Bill 97, with the residual of the ETA business, is a freebee that is an off balance-sheet asset.

Can something like that be worked out?

Mr. Thompson: I can only say that we are not alone in this and we have got the Canada Deposit Insurance Corp. heavily committed. Anything along that line would naturally have to be discussed with them.

Mr. King: Right, but, with your influence and experience, surely some of these government ministries can see their way clear. If the residual value of the ETA business plus the cash flow of the five per cent is producing half a million dollars a year--I have had knowledgeable real estate people tell me that there is already a measurable increase in these Cadillac properties; I have every reason to believe them, they are noninterested parties--I cannot help but think that a transaction can be done with a willingness of all parties.

I would be happy to sit down with Mr. Breithaupt, and yourself and whomever, if we could meet with them. Now, I have never met them. You have to deal with them on a day-to-day basis, I know, but I cannot believe that they are any less than human beings.

Mr. Thompson: This course of action that has gone with Central and has been committed to an agreement, was put in place

to, hopefully, maximize the effect of recovery. Our involvement has really been to use all efforts possible to recover.

The only concern I have is that you are really saying let us go and try to rewrite it.

Mr. King: No, this could be done separately. In the light of what has gone on, and so forth, could something not be worked out with Central Trust? You have the capacity, the power, to transfer those soft assets.

One of our concerns, and I think it is a real concern, is that somebody down the line could buy these common shares and leave us still high and dry. They do not have to pay dividends if the board does not want to.

Mr. Thompson: I cannot see how buying the common shares could leave you high and dry.

Mr. King: Take Seaway Trust as an example that Mr. Boudria mentioned. Let us suppose that somebody comes and buys the common shares of Seaway Trust; those preferred shareholders there are still outstanding. I do not know who they all are, but I think there are three or four.

I have acquired companies on behalf of people who buy the common shares and the preferred shareholders are ignored.

Mr. Thompson: Again, I have talked to the Canada Deposit Insurance Corp.--and will continue to talk to them--because we do get together quite frequently, as you can imagine. I have no objection to talking to them but I would not hold out any expectation because--

Mr. King: Can we do that?

Mr. Thompson: I certainly would explore it.

Mr. King: With your great office of sales, can we not be a little more forthright and up front and say to them that the government would like to resolve this situation or assist these elderly people in a situation that obviously was a misunderstanding as these people obviously did not know their investment was at risk? I know Dr. Elgie says it is a "buyer beware" syndrome, but that is not the way they perceive it.

Mr. Thompson: I have before discussed with the chairman the position of the preferred shareholders. I have no objection to continuing, and I always will continue, to discuss them, because I think--I am not saying this in any shallow form at all--that people understand and are doing their very best. I just have the feeling that at this time, with so much in litigation, and having developed a course of action, I just do not want to hold out any expectation.

I think, as the years go on--and I am sorry it is going to be years--I am quite prepared to put forth to them any proposal that you have.

Mr. King: That would be helpful.

Mr. Breithaupt: Perhaps, Mr. Chairman, this would be an opportune time to complete certainly my questioning of Mr. King whose appearance, I think, has been helpful.

If there is the opportunity for the registrar and Mr. King to meet and at least explore the opportunities of dealing with the CDIC soon, then I think we will have accomplished a positive step to try to bring as much hope and prospects for these preferred shareholders as is realistically possible.

I recognize, of course, that the litigation involved is one that is proceeding or receding inch by inch, as every motion and every alarm and excursion that can be made is done. However, I do believe that there is at least the appearance that the preferred shareholders have, to a degree, been unfortunately the odd man out in this circumstance and have found it very heavy weather and an unexpected result from the event that has involved Crown Trust.

Perhaps on that note, if we can acknowledge that opportunity, we have done something worth while.

Hon. Mr. Elgie: I say this because Wally and I know each other from going to the same hockey games with our children, but I hope he will acknowledge that I personally did have one meeting with him, and that he and Murray and members of that staff have frequent conversations on the telephone and other meetings. Then I think he will acknowledge that it would not be unusual for legal counsel to advise that while an action was under way against the government, which did not conclude until two weeks ago, that the opportunities for discussion were probably not only limited but were impossible. I think we can all agree on that.

I think we can also agree that rather than looking on the position that the government took with respect to those actions as an effort to block the preferred shareholders' interest, what you were proposing was to set aside the whole thing. You were questioning the validity of all of the legislation that put the process in action. Therefore, what you were doing was quite fundamental to the process. It was not a matter of arbitrarily choosing to exercise decision-making power in respect of one group or against another group. You were striking at the very root of the problem, and you know that.

Mr. King: Yes.

Hon. Mr. Elgie: You know that the court at that point did indicate that if this was to be resolved it was a matter that had to be resolved in a civil law suit, not in a judicial review action.

Mr. King: I recognize that it was convoluted in the sense that everybody else was there. I would have liked to have gone by ourselves and said that. We have not proceeded with the writ on that and I have stopped that.

Hon. Mr. Elgie: I was not trying to dissuade you from

doing that, because you have to make those decisions and so do your shareholders. In saying what I said I am not in any way implying you should not do it because that is an option.

I think you will also agree, I hope you will, that if the estates, trusts and agencies accounts that flow directly from the Crown Trust Act, they are not secured, and if they indeed were part of the total value of the total package that was sold to Central, then it is not in the best interests of the preferred shareholders if this act is not passed.

Mr. King: No, I think I said at the beginning--

Hon. Mr. Elgie: I know. I just wanted to reaffirm that.

Mr. King: Yes, I think on balance it is in the best interests. I am just trying to bring up the matter of the residual value. If we could get something for that, it would be very helpful, too.

Mr. Elston: My question is very brief. It is just as a followup to something that was mentioned yesterday and that is with respect to the accumulated costs of professionals so far used.

Hon. Mr. Elgie: I think we indicated that we were gathering that and would talk to you in estimates about that.

Mr. Elston: I thought it was to be made available today. Okay, I guess that is all.

Hon. Mr. Elgie: We are good, but we are not that good.

Mr. Elston: It was indicated yesterday. It still is a concern, if there is--as Mr. Renwick suggested, and some of us, I think, feel in our hearts--some kind of a moral obligation that really comes from the regular Tory process breakdown or perceived breakdown.

Hon. Mr. Elgie: I do not accept that, first of all. That is truly erroneous.

Mr. Elston: I understand that is your feeling, but you did not expect to make your comment without some response.

Hon. Mr. Elgie: No, I understand this is a partisan forum and you are not likely to say, "Good stuff, Mr. Minister," at least publicly you are not likely to say that. What you say in private is your business and my business. You have not said "good stuff", by the way, privately.

Mr. Elston: That is right. It really reflects on the preregulatory breakdown situation. That is really why those numbers are important. They do reflect on what residual value will be left over as well. Some of these costs are going to come out of that, are going to come away from what is left over. So it will be estimates time, whenever that is. That was the only question I had.

Mr. Chairman: Thank you, Mr. Elston. To you, Mr. King,

thank you again for appearing today. We know you spent the latter part of the day with us yesterday. Thank you, once again, for appearing.

Mr. King: You are very welcome. Thank you.

Mr. Chairman: The next witness is Roger F. Chittenden, a member of Crown Trust preferred shareholders management committee.

While Mr. Chittenden is coming to the microphone, I did receive a reply from the Attorney General's office in regard to an inquiry that Mr. Renwick was making, and I would like to have the clerk give you each a copy. We will discuss the matter after we conclude with our present witness.

Thank you for being so patient, Mr. Chittenden. We know you were here yesterday. Thank you for coming back. Do you have a statement?

Mr. Chittenden: Yes. Gentlemen, I am a member of the management committee of the Crown Trust preferred shareholders. You can see I am an elderly old party so I am going to speak from my own point of view.

Yesterday at 10:40 a.m., Mr. Breithaupt, in speaking to Mr. King, used words to the effect that he assumed the preferred shareholders were kept continually informed of the progress of events. He could not have been further from the truth. Up to now, we have been standing outside in the street. Yesterday we made a step forward. We were actually invited to sit down inside. That is the first recognition we have had in the last 300 days.

In order to try to surmount this barrier as a private person, I decided a few days ago to talk to my provincial member of Parliament, but he, true to form, refused to talk to me. He is my link with the government. I voted for the guy and he refused to talk to me.

He wrote that letter to me which Mr. King quoted from in which he described us as people out to make a big fat profit and so forth. If nothing else, would you please recognize us for what we are.

When Mr. King called that meeting back in June, the hall was packed with old people and I was one of them. As you always find in a crowd of old people, they are mostly old ladies because they outlive us.

We did not make an investment to take a substantial risk in the hope of making a large gain. We went into this because we were advised by our brokers that this was a conservative investment with a conservatively-managed old company. It would produce income for us but only had a negligible hope of capital gain. Furthermore, it was in an industry which was rigorously supervised by the government.

Instead of all that, we were shocked to find that we had been led like lambs to the slaughter into a legalized shell game

which had been carried on 100 times under government supervision.

Believe me, those old ladies and this old gentleman were shocked to find that somebody had made off with their money. A blanket was dropped over the whole affair so that we had nowhere to turn, no forum to speak in. The only avenue left open to us was to sue the government on the constitutionality of its actions. You know, we are not a confrontational generation. That line of action sat very uneasily with us. On top of that, we were pushed into bed with Leonard Rosenberg, Andrew Markle and William Player. For us, those are very uncomfortable bedfellows.

Mr. Timbrell's letter is the first piece of nonlegal information that has come into my hands as a member of that committee. I would like you to realize that I approached him before I knew I was going to be invited to speak to you. It was just done on a private basis. I had not been invited to speak to you when I made that approach and when he wrote to me.

That is the first time that I have known or been informed of, in even a semi-official way, what the government's thinking was on this matter and as to how it was trying to unravel this terrible mess.

I think you could have told us quicker than you did. In fact, as Canadian citizens, I think you owe us more than that. Only the other day when we had our last meeting with Mr. King, we said to him, now let us stop fighting with the government and let us be part of the process.

Of course, I am not going to attempt to discuss the suitability of what you are doing. Mr. King is our expert on that subject. I do not want to try to give you the impression that we are all old people who depend to a significant extent on our investment incomes. Our committee includes the president of a financial corporation, a housewife, a gentleman involved in real estate, two businessmen and myself. We believe that we represent a broad spectrum of the 2,000 preferred shareholders of Crown Trust.

I must tell you how this affair looks to us as we stand outside of these discussions. I know you have been deeply immersed in the affairs and probably it is difficult for you to understand how ignorant we have been until this moment.

4:30 p.m.

Our perception is that this is a shell game, that it is still in place, that it is still legal and it can still be played. I would not trust the investment in any trust company with a barge pole, which is a sorry state of affairs for both investors and the trust business.

On behalf of my committee, I ask you, sir, if you cannot create a mechanism by which we can become a part of and have an input into the orderly resolution of this mess. But it has to be something we can afford. I have read in the papers that the federal government funds the legal costs of Indian bands suing for land claims. Can we not be treated as well as Indians?

Thank you for giving me this chance to speak to you.

Mr. Chairman: Thank you, Mr. Chittenden. The first question would be from Mr. Boudria.

Mr. Boudria: The initial reaction I have is I am sorry about the feeling you have towards the trust industry as a whole. It is very unfortunate that people now feel this way about investing in our province. When that happens, just as a reflection, I suppose everyone loses. I hope that things return to the kind of confidence that people in this province once had towards our financial institutions.

Have you attempted to contact the minister or his deputy? If so, what kind of response did you get from them?

Mr. Chittenden: No, I have made no effort. We did all this work through Mr. King.

Mr. Boudria: I see. He has been unable to, so I guess that is the--

Mr. Chittenden: That is correct.

Mr. Boudria: In your comments a few minutes ago, you were asking to become part of the process, that was the expression you used--

Mr. Chittenden: Yes.

Mr. Boudria: --instead of someone who was in a confrontation type of a situation.

Mr. Chittenden: Yes, that is right, that is the wish of our committee.

Mr. Boudria: You have explained that you are not very comfortable being in a position of confrontation, and that is not really what you want. What you want, of course, is your money back.

Mr. Chittenden: That is right.

Mr. Boudria: That is very simple. Were you ever invited to be part of the process, in any way, shape or form?

Mr. Chittenden: No, this is the first time. I appreciate it.

Mr. Boudria: A number of documents were tabled here yesterday. There were four of them, I guess, one of them being a letter of January 20, by Mr. Outerbridge, concerning the original proposal for the Crown/Extendicare offer.

When did you first become aware of the existence of this letter?

Mr. Chittenden: We heard Mr. King refer to this. As a committee we never saw the documentation, nor really understood

the details of the offer, but we heard Mr. King refer to this in a verbal fashion.

Mr. Boudria: Was this recently, or have you known for a long time?

Mr. Chittenden: No, it was quite a long time ago. I am guessing; perhaps in October.

Mr. Boudria: This October?

Mr. Chittenden: I would think so, yes.

Mr. Boudria: The letter is dated January 20, but you only became aware of it in October, nine months later.

Mr. Chittenden: Yes. You see, we did not form a committee until after June.

Mr. Boudria: I am curious to know how your committee was constituted.

Mr. Chittenden: I was advised by my stockbroker, and I assume a lot of other people were, that the best thing we could do was to take advantage of the legal representation that we would be able to get from joining forces with Mr. King as a group. Then a meeting was convened, inviting the preferred shareholders, as I mentioned.

In a meeting like that, everybody tries to sit in the back row. I have the bad habit of sitting in the front row. That is how I got on the committee.

Mr. Breithaupt: Sounds almost as risky as going to church.

Mr. Chittenden: That is right.

Mr. Breithaupt: What church do you go to? It follows the same general pattern: most people sit at the back.

Mr. Chairman: You know all about volunteering, don't you?

Mr. Boudria: I would like to talk briefly about the letter you got from your MPP, or your MLA as he describes himself, Dennis Timbrell, and which was previously referred to by Mr. King.

A considerable part of the letter is dedicated towards establishing what the writer claims to be a large difference between a preferred shareholder--who he said is of the variety of people who get "correspondingly large profits"--and the depositor, who, again according to the writer, gets less profit from his investment. How would you qualify that difference between the two? He claims that the difference is that one made lots of money and one made only a little bit.

Mr. Chittenden: As an investor in that sort of share, I feel that the risk is a bit greater, the return that is offered is

better, and the liquidity is better than buying a guaranteed investment certificate where you cannot get at your money for one year, or five years, and so forth.

I realize there is always a risk in investment--a variable risk--and the only thing which I suppose is without risk is Canada Savings Bonds. But they suffer so badly from inflation that your capital melts away as you are watching it.

Mr. Boudria: I do not know if you want to answer this question in the way that I will ask it. If I can ask the question, then could you follow up a little?

Why did you buy shares in Crown Trust? Was it because it was a safe investment, or was it because you intended to make lots of money?

Mr. Chittenden: No. My broker came to me and said: "This is a chance to make an investment in an extremely secure company, and will give you an opportunity to get a certain amount of income for the capital that you put out. It is a very secure proposition. We recommend it." So, in I go.

Mr. Boudria: Is it your opinion that other investors in your group also felt they were buying this because it was extremely secure, as opposed to "taking a substantial risk in the hope of correspondingly large profits"?

Mr. Chittenden: I would not like to answer that. Honestly, there was a whole roomful of people, all strangers to me. I did not go around and ask them that question. I can only answer from my own point of view. What the answer would be from all those other old ladies, I do not know, but I can guess--probably the same as mine.

Mr. Boudria: Thank you, Mr. Chairman.

Hon. Mr. Elgie: Can I just comment?

In an effort to try to be fair, Mr. Chittenden, I realize that legal opinions are not always worth much when they are given without payment, and without having your own choice, but I would submit to you that paragraph 1 of Mr. Timbrell's letter does not refer to the preferred shareholders. It refers to the common shareholders and those who, as the shareholders, are in charge of the fiduciary operations.

Mr. Chittenden: Yes, it sounds as though he is describing the common--

Hon. Mr. Elgie: The fourth paragraph on page 2, distinctly says we will now talk "with respect to the interests of the preferred shareholders." I realize that one can interpret letters in different ways but, with respect, I would suggest that there is another point of view, and one would have to choose which was the accurate interpretation.

Mr. Chittenden: Yes, it does sound as though he was

describing common shareholders. I have no issue to take with whatever else he said in his letter. I was delighted to be informed as to what you were doing.

Hon. Mr. Elgie: With respect, Mr. Boudria, to Mr. Outerbridge's letter, it is one of hundreds, I may add. You will also understand that correspondence forms part of a legal action. There are always responses to letters, and I am interested that whoever provided you with Mr. Outerbridge's letter did not provide you with the response. Nor do I intend to, either, because it is part of the documentation in an action. I am curious that you have the advantage of an ex parte provision of a document somehow.

4:40 p.m.

Mr. Chittenden: Can I say to you that when I got this letter back from Mr. Timbrell the other day, I thought, I would love to speak to Dr. Elgie and tell him that I think the lines of communication have been very bad and they ought to be brushed up.

Hon. Mr. Elgie: I tried to explain to Mr. King, and I hope you heard the explanation. I think you would understand that in the course of a lawsuit which was against the government's position, really trying to strike at the very heart of what it had done and had seen itself doing to protect everyone, it was very difficult to carry on conversations until that was resolved.

Now it has been resolved and whatever decisions you make from now on will be yours, but in the absence of any other lawsuits, we are quite prepared to do as the registrar has indicated.

Mr. Chittenden: And you realize too, that we felt it was no good fighting with the government; let us be part of the process. That is what we, as a committee, want to do.

Mr. Breithaupt: This is certainly the feeling we have as we go through these matters.

Mr. Williams: Mr. Chittenden, I just want to get some clarification. I am at a disadvantage because I am not a regular member of the committee and have not participated in the debate in the last day or two, so I am just picking up from what has been said here this afternoon.

What was of interest and concern to me was your comment about being a member of the management committee of the Crown Trust preferred shareholders. You explained to the committee to some extent that the number of members on the management committee--I understood them to be six in total.

Mr. Chittenden: Six.

Mr. Williams: --represented a substantial number of the 2,000 preferred shareholders.

Mr. Chittenden: We think we do.

Mr. Williams: How were you able to determine who all of the shareholders were? Did you have access to the records of the company, to enable you to contact these other shareholders?

Mr. Chittenden: How did I get that number? One of our members who is a president of a financial corporation told me that was approximately the number of preferred shareholders. I assumed that he had access to that information.

Mr. Williams: I appreciate and commend you and the others for gathering together. There have certainly been people in my own constituency who are preferred shareholders and have contacted me individually, who certainly, at the time this came to the fore, were perplexed and bewildered by the whole turn of events. I certainly think that it is desirable to have those affected working together collectively to try to get a resolution of the matter.

What I cannot understand is your comment in answer to further questioning, that it had been some 300 days before you could get any information whatsoever. I appreciate the dilemma that the ministry has been in because of litigation and so forth and that it has been somewhat restricted, but I was led to understand from your comments that your group had not contacted the ministry.

What other initiatives, if any, did you in fact take to try to get as much information as possible to better inform the members of the Crown Trust preferred shareholders committee?

Mr. Chittenden: We as a group went to Mr. King as an adviser. The advice that we, as a committee, got was that the only approach or course we could take was the legal one, of attacking the validity of the legislation itself.

So we were governed by that advice. We asked for advice, we got it and we took it. Subsequently, as time went on, we did feel uncomfortable, as I explained to you, with that course of action, and about a week or more ago we said to Mr. King that we would be happier to go with the process rather than to attack it.

Mr. Williams: I see. So the matter of not being able to have access to information or not contacting other persons was based on an earlier decision as to a particular course of action you would take as discussed with Mr. King.

Mr. Chittenden: Quite candidly, we shareholders are pretty dumb people. We did not know what to do. It seemed to us that all avenues of progress were closed to us.

Mr. Williams: What was your reaction to Mr. Timbrell's letter to you?

Mr. Chittenden: I was very glad to find out what was happening. It was just as though a window opened and I began to see what was going on. I was delighted to receive the information.

I just did not like the way we were characterized as

shareholders, but I was delighted to see what was going on and the way you were thinking about it. It does not sound unreasonable.

Mr. Williams: It just seemed to me somewhat perplexing that it had taken that long to get any type of official response--

Mr. Chittenden: Yes, it was very frustrating.

Mr. Williams: --particularly when you are an organized group. I thought that any avenues available to you would have been followed much sooner than what you have indicated. That is what I needed to get clear in my mind. I gather now that there was a certain strategy that was devised and agreed to and that route was followed.

Mr. Elston: They were not launching legal action from the very first moment. That had to be taken later when they had established that they were not getting any information in the earlier days.

They were an organized group taking action against the government which prevented communications all the way through this piece.

Mr. Williams: I am sure it took them a long time to get organized.

Hon. Mr. Elgie: With respect, I think we have already gone through that. Mr. King and I have had a chat about it here in front of you, and he may not have been satisfied with the degree of communications, I do not know but he acknowledged that there were.

I might say that personally I have answered every letter that every shareholder wrote to me, and since the Morrison report has been issued I have forwarded a copy of that to each preferred shareholder who wrote to me.

Mr. Chairman: Are there any further questions for Mr. Chittenden? If not, thank you very much, sir, for being so patient and attending here today.

The next order of business: At the end of yesterday's meeting, Mr. Renwick moved a motion, which stated that Bill 97 be referred, pursuant to the Legislative Assembly Act, to the commissioners of estate bills for their consideration and report.

Through the Clerk of the House to this committee with respect to the provisions of the bill: My first three pages of the summation more or less cover the same parts as are covered by the Attorney General's covering letter. In conclusion, I would say that I appreciate the reasonableness of the honourable members' concerns. They are essentially the following: Notwithstanding that Bill 97 is a public bill, does it not affect certain private interests and could not therefore certain of the standing orders relating to private business be applied to this bill?

Similar concerns have been raised over the years in the

British Parliament where the standing orders provide special structures and means to adjust them. Such a procedural mechanism does not exist in our standing orders and it is not within the authority of this committee to create one. I am therefore duty bound, by the rules of the House, to declare the motion out of order.

Mr. Renwick: Another first; I would rather be second.

Hon. Mr. Elgie: A patient said that to me once: I would rather be the second.

Mr. Chairman: I think that brings us to the next order of business, which is the clause-by-clause deliberations of Bill 97, An Act respecting Central Trust Company and Crown Trust Company.

On section 1:

Mr. Renwick: I really just have the one concern--and I think we should have the benefit of what the minister and his advisers may want to say about it--Crown Trust Co. was one of those most unusual companies which had built up a very substantial estates, trusts and agencies business and had the skill and expertise to deal with that business.

4:50 p.m.

I, personally, know nothing about the capacity of Central Trust Co. to manage what I am led to believe is about perhaps \$1 billion worth of assets which are ETA matters, all of which are fiduciary matters. Second, while it is quite true that Central Trust is registered here and so on, its head office and principal office is elsewhere. This was not the case with Crown Trust, which had a peculiarly Ontario aspect to it; people selected Crown Trust presumably because of a sense of the managerial expertise and ability of those who were responsible for that aspect.

I noticed one of the reservations in the internal study of the commission is a concern about the examination of the ETA business, not of Crown Trust but generally of the operation of the ministry in that field.

I think what I am asking here, with great respect to the officers of Central Trust, is what assurance do we have that the question of fitness, competence and expertise is available in Central Trust to carry out these fiduciary obligations?

Hon. Mr. Elgie: The decision by that joint committee, with advice from accounting firms such as Woods Gordon, was that the offer was the best and that the company chosen was very capable of handling the estates, trusts and agencies account. That is a determination that has been made and, to the best of my knowledge, and the registrar can support this, we have no reason to believe otherwise at this time.

Mr. Renwick: Do you have positive reason to believe that

they have that capacity? For example, what is the extent and nature of Central Trust's ETA business?

Hon. Mr. Elgie: I believe that their estates, trusts and agencies business was very minimal, as we said with the Crown Trust bill. That was what made this company attractive to those who had an interest in it.

Mr. Renwick: That is what concerns me.

Hon. Mr. Elgie: But I would remind you that, as has been pointed out, those who are managing those estates, trusts and agencies accounts are the same people, as I understand it, who managed them for Crown. They were taken over by Central, and it has been acknowledged by people who have appeared before us that they are very capable people, to the best of my knowledge.

Mr. Renwick: I do not want you to be defensive about it. I feel a sense of insecurity in dealing with this bill unless we have a positive statement from the minister and the registrar with respect to competence.

Perhaps you would be good enough to elaborate on that question; if, in fact, the expertise in the managerial sense of that portfolio of fiduciary matters is going to be managed in Central Trust--and I do not want to put words in your mouth--by the people who were managing it in Crown Trust, those kinds of things. I think that the committee needs that kind of statement.

Hon. Mr. Elgie: Obviously, I cannot give you the precise kind of statement you want. I can tell you that Central Trust, recognizing that this was a relatively new area for them, did retain as their new executive officer Mr. Harold Martin, formerly of Montreal Trust Co. in Montreal, who has had extensive experience in this, to head their operation. So I think they have made an effort to put the people in place at that level who may have been lacking, and the people from Crown Trust at the various other levels continued on.

Mr. Renwick: We are being asked that all of these fiduciary matters--there must be a myriad of people involved who have interests one way or another, as beneficiaries and otherwise, who are dependent entirely on us saying we are quite happy to vest the title out of Crown Trust into Central Trust. I assume there is no one from Central Trust here to speak to us about it.

I think that is what has been gnawing at me about what we have been about and why I was expressing concern, both with respect to the fact that, in my humble judgement, it was an estate bill and was a serious bill and an important bill, even though, from a business point of view, it may be deemed to be a consequential bill, in other words, to complete the transaction which has been agreed on.

Hon. Mr. Elgie: As you say, it is a bill that is not novel. Similar legislation was passed, I recall, with respect to Royal Trust and Montreal Trust across the country, so the precedent for this type of legislation exists.

Mr. Renwick: Perhaps I could ask the registrar: Has there ever been any problem or difficulty the registrar has encountered with Central Trust before they appeared on the scene as the potential for the purchaser of Crown Trust?

Mr. Thompson: No. In fact, I cannot recall a complaint but, concerning their method of operation, since their assumption of power I have sat on the management committee with Harry Rhude and--

Mr. Renwick: What role is he playing now?

Mr. Thompson: Harry Rhude is the chief executive officer of Central. He is there and--

Mr. Renwick: And he went there from the beginning?

Mr. Thompson: No. He was there from the beginning. I know that Harry Rhude is the chief executive officer. His number two man is a Mr. McBirney. He is a chartered accountant and Harry Rhude is a lawyer. Together, I must say that they run, from my own observation, a very sound financial and responsive type of organization. The meetings that we have are usually brisk meetings, if I can use that term. They are businesslike and they appear to be effective.

To enhance that, because certainly they did not have what Crown had--and I think perhaps this is what you are talking about. Crown was a national company across this country; they did not have that experience in operating, particularly in the personal estates area. To complement that, they brought in Harold Martin, whom they hired from Montreal Trust.

Mr. Renwick: Was he involved with Montreal Trust in Ontario?

Mr. Thompson: I believe he was, yes. They brought him in to give them that depth and perception as to the operation of the trust business.

Mr. Renwick: My questions tend to sound a bit as though I am a patsy for the government on it. I am not trying to open up matters which will be discussed later on. Nevertheless, when the loan and trust examiners "have executed their responsibilities in a manner consistent with the objectives and financial examination services branch and the requirements of the existing legislation with the exception of subsections 1(10) and 1(11) of the act relating to estates, trusts and agencies," will you be able to give us any kind of assurance?

When these transfers do take place, and bearing in mind that these transfers were intended to give Central Trust an opportunity to have an estates, trusts and agencies business, what assurance do we have in the assembly, in passing this act, that they will receive some special attention from your ministry--or, for that matter, from the examination with respect to the way in which Mr. Martin, whom I do not know but who I assume is a knowledgeable and capable person, works?

Everything I know about Central Trust would lead me to believe that it is a very closely held organization. I tried to follow what has happened. I believe they originally took over Eastern Trust at one time.

5 p.m.

Is there some way that we can say that you are going to, not necessarily supervise, but you are going to have a special interest in the interests of the beneficiaries and trustees and others who are dependent on us in making the transfer, so that it will be handled well and properly? I have overexpressed my anxiety, but that is what my concern is.

Mr. Thompson: I think the comment there is one of general application. Basically in personal estates the surrogate court has been (inaudible) in its ability to hear cases of maladministration of estates and look into matters on behalf of beneficiaries, such as breach of trust and surcharges and things like, that has been the moderating factor in it.

I think from the other point of view we have really always recognized that something additional to that might well be required, and we have primarily relied on that factor and primarily relied on a complaint procedure. Certainly what we have tried to follow through in the white paper is to promote a broader system of regulation which I strongly support.

In this particular case, it is without qualification. Yes, we take a great deal of interest in it, particularly in the estates, trusts and agency area.

In fact, I hope that is really why we are here today. We want to see it preserved with as much disruption as possible and, indeed, well administered and building in that area. From my own perspective, we have few enough companies offering a complete range of trust services in Canada. In fact, we may be down to half a dozen that really are offering a complete and full range of trust services. That, to us, is one thing we go back to. We look for the reason for being of trust companies, to emphasize that for the public.

Mr. Renwick: All I can do is address the concern I have about the problem. It is, in a sense, divorced entirely from the fiasco of the Crown Trust and other businesses. It is almost like Central Trust coming and asking us for a special act of the Legislature to perfect a transaction and to make sure there are no loose ends from a legal point of view in divesting questions and so on. In that sense, you are somewhat in the position of a surrogate for them, and I do not think I need pursue it any further.

Mr. Chairman: Is there any further discussion on section 1?

Section 1 agreed to.

On section 2:

Mr. Chairman: Mr. Eves moves that section 2 of the bill be amended by striking out the word "acts" in the fifth line and inserting in lieu thereof the word "rights."

Mr. Eves: This amendment is made to be consistent with the reference to rights in the first line of section 2 and also, of course, it is rights that may be enforceable, not acts.

Mr. Renwick: Very clever of you to spot that.

Mr. Eves: Thank you.

Motion agreed to.

Mr. Breithaupt: I have an amendment with respect to section 2 which I wish to place so we can have a brief discussion on it.

Mr. Chairman: Mr. Breithaupt moves that section 2 of the bill be amended by adding thereto the following subsection:

"Notwithstanding any provisions of this or any other act, no transfer of the trusteeship or agency business with Crown Trust Co. to Central Trust Co. is valid unless and until all obligations and moneys owed to the holders of any Crown Trust Co. preferred shares are fully satisfied in accordance with the terms and conditions of the share issue therein and unless and until any holder of Crown Trust preferred shares is offered the opportunity to sell or redeem said shares for a price equivalent to that at which such shares last were publicly traded."

Mr. Breithaupt: I would speak just briefly to the amendment. As you can see, the amendment is based upon the background and comments which we have heard on the plight of the preferred shareholders throughout this matter. The registrar has commented that he is certainly interested in the difficulties which the preferred shareholders face.

I would be prepared to withdraw the amendment if there is a clear statement by the superintendent with the acquiescence, involvement, guidance and leadership, I might add, of the minister, that there will be an attempt with Mr. King on behalf of the preferred shareholders and with Mr. Shuve on behalf of Central Trust to try, at least, to work out a situation whereby there can be some better guarantee of recovery for the preferred shareholders than what we have seen.

Perhaps the superintendent could consider my comments and reinforce what we would hope could be done. I think in this matter if we are able to at the very least give an opportunity for some meaningful discussions with the parties involved, then we will have accomplished something. I would hope that we can be in that position and that we do not have to bring in an amendment which may be routinely defeated.

I think this area has concerned all the members of the committee who have spoken during the presentation by Mr. King. I think they have all shown some sympathy about the difficulties

which are being faced. While I cannot speak, obviously, for all the members, I sensed that the attitude and concerns which were expressed were from a sense of fairness, ones that we would all hope could be resolved. That may not be possible, but I feel that the opportunity must exist to at least try.

Perhaps if the superintendent could respond to my comments, we could see what we have to do about the amendment.

Mr. Thompson: I have no hesitation in saying I will use my absolute best efforts in this area. Believe me, I even personally know preferred shareholders who I have to deal with.

Mr. Renwick: Your best friend?

Mr. Thompson: My wife's best friend.

Mr. Breithaupt: How are you getting along with your wife?

Mr. Thompson: Sometimes not too well when the subject comes up. It is not a subject that I am unfamiliar with. I do say, in all sincerity, I feel that there is much merit in the claim that they are the odd man out in this situation. I will do everything within my power to try to advance their cause.

I have some ideas that I can suggest that might answer.

Mr. Breithaupt: Do you think you will be able at least to encourage a meeting with Mr. King, Mr. Rhude, and no doubt other similar people involved?

Mr. Thompson: Oh, yes.

Mr. Breithaupt: Is that something that can be accomplished?

Mr. Thompson: I think the way is clear now.

Hon. Mr. Elgie: Mr. Rhude is not really directly involved in it. It would be meetings with the Canada Deposit Insurance Corp. and others.

Mr. Breithaupt: I recognize CDIC would have to be involved in any final suggestions. Their approval no doubt would be required to any proposal.

Hon. Mr. Elgie: You would only go to Mr. Rhude in Central Trust if there were a commercially reasonable and feasible proposition that was agreed to by people ahead of time. There is no point in involving him--

Mr. Breithaupt: I understand that. On that suggestion, then, I will be pleased to withdraw my amendment.

Hon. Mr. Elgie: Fine, because it would have defeated the bill.

Mr. Breithaupt: I had that in mind.

Hon. Mr. Elgie: I had it in mind that it might not pass.

Mr. Renwick: I had the thought that it might have been out of order.

Hon. Mr. Elgie: Moving right along, Mr. Chairman--I think you are right, actually.

Mr. Chairman: Thank you gentlemen.

Section 2 agreed to.

On section 3:

Mr. MacQuartie: With respect to clause 3(1)(a), I was wondering if I could get the assurances of the superintendent that this section does, in fact, cover all of the soft assets?

Hon. Mr. Elgie: It is the opinion of counsel that they are protected.

Mr. Elston: What is that opinion worth?

Hon. Mr. Elgie: Yes, some of them are. It depends what you pay for.

Section 3 agreed to.

Sections 4 to 8, inclusive, agreed to.

On section 9:

Mr. Renwick: On section 9, I am interested in the intention of the minister about this act coming into force, in view of the statement that in other jurisdictions you are going to require similar legislation. Is it your intention to have this act passed by the assembly, and then wait until the other acts have been passed?

Hon. Mr. Elgie: No.

Mr. Renwick: Could you tell us when you expect to proclaim it?

Hon. Mr. Elgie: Immediately.

Mr. Renwick: Immediately. So it would be for practical purposes as if it did not have this clause in it at all?

Hon. Mr. Elgie: (Inaudible).

Mr. Breithaupt: Why wouldn't you have a retroactive date to the effect of say, Bill 215? Or was that not required? Just to take over any transfer or signing rights and avoid any questions on conveyances or anything else that might arise?

Hon. Mr. Elgie: I think there is something in there about that.

Mr. Breithaupt: Or did I miss that?

Mr. Revell: If I may reply to Mr. Breithaupt, I believe that subsection 3 covers the very issue you are dealing with--

Hon. Mr. Elgie: No, we are not making it retroactive.

Interjections.

Mr. Breithaupt: One at a time, please.

Mr. Revell: --the provision dealing with those assets which have already been transferred. That is in subsection 3.

Hon. Mr. Elgie: Yes, that is it.

Mr. Revell: Sorry, subsection 3(3), on page 2 of the bill.

Hon. Mr. Elgie: This does not set aside the judgement of the court other than in that issue. It does not purport to do that.

Mr. Renwick: How many other jurisdictions do you have to deal with? Are they all in Canada?

Hon. Mr. Elgie: All in Canada: British Columbia, Alberta, Manitoba, Saskatchewan and Quebec.

Mr. Renwick: Your discussions are such that you do not anticipate any trouble?

Hon. Mr. Elgie: Not to date. We have not heard of anybody who objects.

Mr. Renwick: Thank you.

Section 9 agreed to.

Section 10 agreed to.

Title agreed to.

Bill, as amended, ordered to be reported

Mr. Chairman: I think that brings us to the conclusion of today's business. I presume we will start estimates tomorrow morning, or do we have any other suggestions, gentlemen?

The committee adjourned at 5:16 p.m.

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